Supreme Court, U.S.
FILED

No. 03-1279 MAR 10 2004

In The Supreme Court of the United States

ANDRE A. FOREMAN,

Petitioner,

v.

CHARLES D. GRIFFITH, JR.; BERNARD A. PISHKO; CALVIN R. DEPEW; CITY OF NORFOLK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. For purposes of 42 U.S.C. § 1983, does a plaintiff's allegations of malicious defamation by a government official under color of law which occasioned a precipitous job demotion and loss of annual remuneration exceeding $25,000 without any type of hearing state a claim of a deprivation of liberty without due process in violation of the Fourteenth Amendment?

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The Petitioner Andre A. Foreman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-titled proceedings on November 17, 2003.

OPINIONS BELOW

1. The October 3, 2002 Dismissal Order of the United States District Court for the Eastern District of Virginia is unreported and reproduced at Appendix C-1.

2. The November 17, 2003 Per Curiam Opinion of the United States Court of Appeals for the Fourth Circuit was unpublished, is unreported and reproduced at Appendix A-1.

JURISDICTION

A two judge panel of the United States Court of Appeals for the Fourth Circuit entered its ruling affirming the dismissal of Petitioner's section 1983 liberty interest claim against Respondents on November 17, 2003.[1] Petitioner filed a Petition for Rehearing En Banc on November 26, 2003. The Fourth Circuit denied that Petition on December 12, 2003. The jurisdiction of this Court to review the final judgment of the Court of Appeals dismissing Petitioner's liberty interest claim under 42 U.S.C. § 1983 is invoked under 28 U.S.C. § 1254(1).

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[1] The court also affirmed the District Court's dismissal of Petitioner's property interest claim, and reversed and remanded the District Court's dismissal of his defamation claim, neither of which is at issue in Petitioner's certiorari filing.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment of the Constitution provides that no "state [shall] deprive any person of life, liberty, or property, without due process of law".

42 U.S.C. § 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Petitioner Andre Foreman originally filed suit against Respondents Griffith, Pishko, Depew and the City of Norfolk on March 28, 2001 in the Circuit Court of Fairfax County, Fairfax, Virginia. The Motion for Judgment or complaint alleged, *inter alia*, defamation and deprivations of

liberty and property interests without constitutional due process under 42 U.S.C. § 1983.

The case was removed to the United States District Court for the Eastern District of Virginia on April 11, 2002 under 28 U.S.C. § 1441(c) because federal claims were presented under section 1983 accompanied by a state defamation claim against Respondent Griffith.

The District Court dismissed Petitioner's liberty interest claim, property interest claim, defamation claim and residual claims against Respondents on October 3, 2002. (Appendix C-1).

Petitioner filed an appeal to the Fourth Circuit on October 31, 2002 pursuant to 28 U.S.C. § 1291 challenging only the liberty interest, property interest, and defamation dismissals. A two judge panel of the Fourth Circuit on November 17, 2003 vacated the District Court's dismissal of Petitioner's defamation claim against Respondent Griffith, remanding it for further proceedings; affirmed the District Court's dismissal of Petitioner's property interest claim; and, affirmed the District Court's dismissal of Petitioner's liberty interest claim. (Appendix A-1). Petitioner's Petition for Rehearing En Banc was denied on December 12, 2003. (Appendix D-1) Petitioner is seeking review by this Honorable Court only of the dismissal of his liberty interest claim under section 1983.

Petitioner's complaint alleged the following as demonstrating a constitutionally protected liberty interest:

1. Prior to March 28, 2000, Petitioner was Deputy City Attorney for Respondent City of Norfolk. He enjoyed a sparkling professional reputation, and was a candidate for appointments to the local Airport Authority and to the Virginia judiciary as a Juvenile

and Domestic Relations Judge. (Appendix E-5, E-6, E-66)

2. Respondent Griffith, at the culmination of a four-year investigation of the role of Petitioner in the award and execution of a 1997 contract between Respondent City of Norfolk and Tidewater Towing Services, Inc., published a report massively defamatory of Petitioner. (Appendix E-3 to E-4).

3. Respondent Griffith's report falsely and maliciously maintained that Petitioner was guilty of reprehensible, unethical, and dishonest conduct and favoritism towards Tidewater Towing, Inc. in the award of a city towing contract. (Appendix E-5).

4. Respondent Griffith's report was published by distribution, *inter alia*, to the City of Norfolk manager, the Mayor of Norfolk, Respondent Pishko, all of the members of the Norfolk City Council, and members of the press. Respondent Griffith knew that his report would be published and re-published in the local media. (Appendix E-4).

5. Respondent Griffith's report was first reported in the news media on March 28, 2000, and continued, including, but not limited to, articles published on or about March 28, 2000, March 29, 2000, March 30, 2000, April 5, 2000 and April 19, 2000. Those media stories contained the false statements and innuendos of Respondent Griffith's report, which would lead a reasonable citizen to conclude that Petitioner was a corrupt lawyer, unfit to perform his duties as a city employee, and probably guilty of criminal conduct involving moral turpitude. The public airing of the report damaged Petitioner's professional and

personal reputation for competence and integrity and humiliated him. (Appendix E-4 to E-5).

6. Respondent Pishko, knowing fully the falsity of the defamatory statements and innuendo contained in Respondent Griffith's report and the subsequent republications, nevertheless relied on the report to demote and reassign Petitioner to Assistant City Attorney, with an annual loss of $25,000 in salary. The Griffith report plus the devastating demotion and slash in remuneration aborted Petitioner's candidacies to the Airport Authority and the state judiciary. (Appendix E-5 to E-6).

7. Respondent Pishko took the crippling adverse personnel action without affording Petitioner an opportunity to be heard despite Petitioner's several requests to present evidence in an official pre-termination hearing to publicly clear his good name and to remain in his job. Respondent City of Norfolk likewise refused Petitioner's requests for a hearing. (Appendix E-6, E-7, E-13).

8. Respondents, jointly and severally, violated the constitutionally protected liberty interest of Petitioner by causing him to suffer a vertical plunge in remuneration and employment status with Respondent City of Norfolk as caused by the publication of malicious and fallacious insinuations and innuendo contained in the report of Respondent Griffith and without affording Petitioner an opportunity for a hearing. (Appendix E-6, E-7, E-13).

The District Court dismissed Petitioner's liberty interest claim on the illogical theory that a property interest in contractual employment was necessary to create a constitutionally protected liberty interest when combined

with the government's destruction of Petitioner's good name. (Appendix C-1). In other words, liberty interest and property interest claims are conflated under section 1983.

The court of appeals affirmed the dismissal for equally unsound reasons. First, the two member panel erroneously declared that the Fourth Circuit's decision in *Johnson v. Morris*, 903 F.2d 966 (1992), held that a demotion, no matter how severe in loss of duties and plunging pay, can never sustain a liberty interest claim. (Appendix A-15). That wild assertion clashed with the words of *Johnson* itself, which stated that "for a liberty interest to have been implicated [in defamation] some damage [to plaintiff's] employment status must have resulted from the reasons for his demotion." 903 F.2d at 999. That precedent declined to state what the two member panel insisted it stated; namely, that employment termination was a sine qua non of a viable liberty interest claim. (Appendix A-15).

The two member panel also obtusely denied that Petitioner's pronounced demotion and slashing of remuneration was caused by Respondent Griffith's defamatory report. (Appendix A-15). But Petitioner's complaint alleged precisely that; i.e. that Respondents Pishko and the City of Norfolk demoted Petitioner from Deputy City Attorney to Assistant City Attorney with a loss in annual salary of $25,000 because of Respondent Griffith's defamatory report. (Appendix E-6 to E-7). The two member panel inarguably misread the complaint.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's decision conflicts with decisions of this Court, other Circuits, and the Fourth Circuit itself in *Johnson v. Morris*.

This Court's decisions in *Wisconsin v. Constantineau*, 400 U.S. 564 (1971), *Paul v. Davis*, 424 U.S. 693 (1976), and *Owen v. City of Independence*, 445 U.S. 622, 633 n. 13 (1980) collectively declared that defamatory or stigmatizing statements by a government official that cause the government to take material adverse employment or other action against the defamed or stigmatized victim establish a liberty interest protected by constitutional due process. Petitioner's case is indistinguishable from *Owen*, supra, except for the fact that his devastating demotion and loss of remuneration fell short of an actual discharge. There, a city council published an allegedly false resolution impugning the honesty and integrity of a police chief, who was discharged the next day. The resolution received extensive coverage in the press. This Court explained:

> "[E]ven if they did not in point of fact 'cause' petitioner's discharge, the defamatory and stigmatizing charges certainly 'occur[red] in the course of the termination of employment [Citation omitted]. Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the city's action deprived petitioner of liberty without due process of law." 445 U.S. at 633 n. 13

In *Constantineau*, this Court recognized a liberty interest "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is

doing to him, [and thus] notice and an opportunity to be heard are essential." See *Constantineau* at 437. As explained in *Paul*, what the government did to the plaintiff in *Constantineau*, in addition to defamation, was to deny the opportunity to purchase alcohol. What the government allegedly did to Foreman because of Griffith's defamatory report was much worse: a demotion, a loss of approximately 25% of his salary and additional fringe benefits, a loss of title and responsibilities and, a killing of his candidacies for a judgeship and the Airport Authority. Thus, to deny Foreman's liberty interest claim would be to flout the teaching of *Constantineau* as to the severity of adverse government action caused by defamatory or stigmatizing statements needed to create a constitutionally protected liberty interest.

The *Paul* precedent has been interpreted by federal circuit courts to require a sufficient "plus" factor in addition to defamation to make out a protected liberty interest.

The District of Columbia Circuit in *Mosrie v. Barry*, 718 F.2d 1151 (D.C. 1983), maintained that: "[f]or a defamation to give rise to a right to procedural due process, it is necessary... that the defamation be accompanied by a discharge from government employment or at least a demotion in rank and pay." *Id.* at 1161, restated in *Doe v. United States Department of Justice*, 753 F.2d 1092 at 1109 (D.C. 1985).

The Third Circuit, in its analysis of the "plus" factor required by *Paul*, observed in *Ersek v. Town of Springfield*, 102 F.3d 79 (3rd Cir. 1996) that:

> "it is not clear whether a demotion in rank, in contrast to an actual termination or discharge, is a sufficient "plus." Cases cited to us by both parties disagree over the matter. Without so holding, we implicitly assumed in *Clark v. Township of Falls*, 890 F.2d 611 (3rd Cir. 1989), that a demotion would have sufficed. The courts in *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1486 (11th Cir. 1992)... and *Mosrie* [citation omitted] seem to agree." *Ersek* at 83, n. 5.

The Third Circuit, however, neglected, as it had done in *Clark*, to definitively rule on the sufficiency of a crippling demotion to satisfy the "plus" requirement of *Paul*.

The First Circuit has acknowledged the befuddling parameters of the "plus" factor required by *Paul*. Ruling in *Beitzell v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981), the First Circuit followed the instruction of this Court in *Owen*, stating broadly:

> "The [Supreme] Court has not interpreted the requirement of change in 'rights' or 'status' technically... Thus, the cases suggest there is a core interest in reputation which is protected from interference by individualized government action; the Fourteenth Amendment procedurally protects reputation only where (1) government action threatens it, (2) with unusually serious harm, (3) as evidenced by the fact that employment... is affected." *Beitzell*, at 878.

The First Circuit's ruling in *Beitzell* restated its holding in *Rodriguez de Quinonez v. Perez*, 596 F.2d 486 at 489 (1st Cir. 1979) that "[w]hile defamation by a government official,

standing alone, does not work a deprivation of liberty protected by the fourteenth amendment, government action altering a right or status previously held... combined with the injury resulting from the defamation justifie[s] the invocation of procedural safeguards."

In sum, neither this Court nor any court of appeals- but for the Fourth Circuit in this case- has declared that a termination of government employment is indispensable for a viable liberty interest claim. Indeed, such an interpretation would be unpersuasive, and invite government circumventions by defamation-caused demotions of professionals to menial work with minimal compensation.

Certiorari is warranted in this case to provide guidance as to the "plus" factor required to demonstrate a protected liberty interest under *Paul, Constantineau,* and *Owen* in the context of adverse employment action because of government defamation. The issue is recurring, not flukish.

2. The Fourth Circuit's application of its own liberty interest precedent in *Johnson v. Morris* egregiously wrenched the facts and law and caused a flagrant miscarriage of justice.

The Fourth Circuit's liberty interest dismissal in this case pivoted on *Johnson,* but overlooked constitutionally decisive distinctions in Petitioner's case. The panel absurdly maintained that Petitioner "suffered no damage to his employment status" because he remained employed in the Norfolk City Attorney's office. (Appendix A-15). But Petitioner's salary was slashed by $25,000 annually and his job responsibilities and job title plunged.

In *Johnson,* by contrast, there was no discernible change in the complaining employee's job status; the

employee was transferred, with apparent retention of rank and pay. 903 F.2d at 999. Further, the employee was afforded the opportunity of a due process hearing to clear his name. 903 F.2d at 998. Petitioner Foreman, in stark contrast, was repeatedly denied a hearing to clear his name. In *Johnson*, it was plaintiff's adverse employment treatment which occasioned a public announcement of derogatory statements about plaintiff. The employment action in *Johnson* engendered the defamation, not vice versa. But in Petitioner's case, the complaint alleges that Respondent Griffith's defamatory report caused Petitioner's devastating demotion and slash of pay, which made out a protected liberty interest in the language of *Johnson* itself: "[F]or a liberty interest to have been implicated, some damage to Johnson's employment status must have resulted from publication of the reasons for his demotion." See *Johnson*, 903 F. 2d at 999. That observation fits Foreman's liberty interest claim like a glove.

The two member panel's unpublished ruling rejecting that claim and egregiously misreading *Johnson* constituted a flagrant miscarriage of justice that cries out for correction.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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March 10, 2004

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Andre Foreman, *Plaintiff-Appellant,*	)	
and	)	
William Summs, *Plaintiff,*	)	No. 02-2284
v.	)	
Charles D. Griffith, Jr.; Bernard Pishko; Calvin Depew; The City of Norfolk, *Defendants-Appellees.*	)	

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, Senior District Judge.
(CA-02-380-2, CA-02-394-2)

Argued: September 26, 2003
Decided: November 17, 2003
ENTERED: November 17, 2003

Before WILKINS, Chief Judge, and
HAMILTON, Senior Circuit Judge.*

Affirmed in Part, vacated in part, and remanded by unpublished per curiam opinion.

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* The Opinion is filed by a quorum of the panel pursuant to 28 U.S.C § 46(d).

COUNSEL

ARGUED: Bruce Elliot Fein, FEIN & FEIN, Washington, D.C., for Appellant. Alan Brody Rashkind, FURNESS, DAVIS, RASHKIND & SAUNDERS, P.C., Norfolk, Virginia, for Appellees Pishko and Norfolk; Michael Eugene Ornoff, ORNOFF & ARNOLD, P.C., Virginia Beach, Virginia, for Appellees Griffith and Depew. **ON BRIEF:** Gilbert K. Davis, DAVIS & STANLEY, L.L.C., Fairfax, Virginia, for Appellant. James A. Cales, III, FURNISS, DAVIS, RASHKIND & SAUNDERS, P.C., Norfolk, Virginia, for Appellees Pishko and Norfolk.

Unpublished opinions are not precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Andre Foreman (Foreman) appeals the district court's dismissal of his § 1983 claims alleging deprivation of liberty and property interests without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV; 42 U.S.C. § 1983. He also appeals the district court's dismissal of his state law defamation claim. We affirm in part, vacate in part, and remand for further proceedings.

I.

Foreman is a deputy attorney for the City of Norfolk, Virginia (the City). He filed the present action after he was demoted to a lesser position in the City Attorney's Office following the release of an investigative report (the Report)

prepared by Charles Griffith, the Virginia Commonwealth's Attorney for the City of Norfolk. In the Report, Griffith concluded that Foreman had acted improperly, although not criminally, in negotiating a towing contract on behalf of the City with Tidewater Towing, Inc. Bernard Pishko was Foreman's boss at the City Attorney's Office, and the person who demoted him.

Griffith released the Report to print and broadcast media, which media outlets in turn quoted portions of the Report that Foreman claims are defamatory. The primary accusation against Foreman in the Report was that he engaged in unethical favoritism of Tidewater Towing, Inc. at the City's expense and to enrich himself. Foreman alleges that the accusation is false and damaging his professional reputation.

At issue in the present appeal are the following three claims by Foreman:

(1) a property interest claim, based upon Foreman's particular position in the City Attorney's Office, against Pishko and the City, alleging the failure to provide him a name-clearing hearing prior to his demotion violated the Due Process Clause of the Fourteenth Amendment;

(2) a liberty interest claim against Pishko and the City, alleging harm to Foreman's professional reputation, because Pishko and the City failed to provide him a name-clearing hearing prior to releasing the Report and demoting him, in violation of the Due Process Clause of the Fourteenth Amendment; and

(3) a defamation claim under Virginia common law against Griffith, without specifying capacity, individual or official.

Foreman originally filed this action in state court. Specifically, he filed a complaint and an amended complaint, respectively entitled motion for judgment and amended motion for judgment. The action was subsequently removed to the United States District Court for the Eastern District of Virginia. Griffith, Pishko, and the City (collectively the Defendants) moved to dismiss the entire action pursuant to Federal Rule of Civil Procedure 12(b)(6), and Griffith filed a separate motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). The district court granted the motion for a more definite statement, and Foreman complied.[1]

The Defendants then renewed their Rule 12(b)(6) motions, which the district court granted. Foreman noted this timely appeal.

II.

We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6). *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). "[A] Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

III.

Foreman first contends that the district court committed reversible error by dismissing his Virginia state law defamation claim against Griffith. We agree.

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[1] From here forward, we will refer to the complaint, amended complaint, and more definite statement collectively as "the Complaint."

Relying exclusively on Eighth Circuit precedent, *see Egerdahl v. Hibbing Community College*, 72 F.3d 615, 619 (8th Cir. 1995); and *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989), the district court dismissed Foreman's defamation claim on the basis that, because the Complaint failed to expressly state that Griffith was being sued in his individual capacity, the Eleventh Amendment to the United States Constitution barred his claim. U.S. Const. amend. XI. The Eleventh Amendment to the United States Constitution provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.* While "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts," *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996), the Supreme Court has long "'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms,'" *id.* (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). That presupposition is "that an unconsenting State is immune from suits brought in federal courts by its own citizens as well as by citizens of another State," *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), "unless [it] consent[s] to [such suits] in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity," *Green v. Mansour*, 474 U.S. 64, 68 (1985). Notably, the Supreme Court has made clear that the "Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (internal quotation marks omitted).

The Eighth Circuit cases relied upon by the district court stand for the proposition that if a plaintiff's complaint is silent about the capacity in which he has sued a state

actor, the court should interpret the complaint as including only official capacity claims. *Egerdahl*, 72 F.3d at 619; *Nix*, 879 F.2d at 431.

In *Biggs v. Meadows*, 66 F.3d 56 (4th Cir. 1995), the Fourth Circuit expressly rejected the Eighth Circuit's mechanical approach to determining the capacity (official versus individual) in which a plaintiff has sued a state actor in favor of a more flexible approach that looks to the nature of the plaintiff's claim or claims, the relief sought, and the course of proceedings. *Id.* at 59-60. With respect to assessing the nature of a plaintiff's claim or claims, the *Biggs* court stated that the plaintiff's failure to allege that the defendant acted in accordance with a governmental policy or custom or the lack of indicia of such a policy or custom on the face of the complaint indicates that a state actor has been sued in his individual capacity. *Id.* at 61. With respect to the nature of the relief sought, the *Biggs* court also stated that the plaintiff's request for compensatory or punitive damages indicates an individual capacity suit since such relief is unavailable in official capacity suits. *Id.* Finally, with respect to the course of proceedings, the *Biggs* court stated that the defendant's assertion of qualified immunity as a defense indicates an individual capacity suit, since such a defense is only available in individual capacity suits. *Id.*

In resolving the question of whether Foreman sued Griffith for defamation in his individual or his official capacity, the district court erred in applying the Eighth Circuit's mechanical approach.[2] The district court should

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[2] Griffith argues that, because Foreman failed to make a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, he should be barred from challenging the district court's dismissal of his defamation claim. Griffith's argument is without merit. Foreman is entitled to challenge the district court's Rule 12(b)(6) dismissal of his defamation claim on appeal without having first made a Rule 59(c) motion below.

have applied the more flexible approach set forth in *Biggs*.[3] Our own application of the *Biggs* approach to the Complaint leads to the inescapable conclusion that Foreman sued Griffith for defamation in his individual capacity.

The nature of Foreman's defamation claim suggests that Foreman sued Griffith in his individual capacity. Under Virginia law, defamation is an intentional tort for which the government officials do not enjoy sovereign immunity, irrespective of whether they acted within or without the scope of their employment. *Fox v. Deese*, 362 S.E.2d 699, 705-06 (Va. 1987); *Elder v. Holland*, 155 S.E.2d 369, 372-73 (Va. 1967). Additionally, the Complaint does not allege that Griffith, in allegedly defaming Foreman, acted in accordance with a governmental policy or custom.

The nature of the relief sought by Foreman with respect to his defamation claim, compensatory and punitive damages, suggests that Foreman sued Griffith in his individual capacity. Finally, Griffith's assertion of qualified immunity, a defense only asserted in individual capacity suits, suggests that Foreman sued Griffith in his individual capacity.

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[3] We observe that *Biggs* involved federal claims brought pursuant to 42 U.S.C. § 1983 as opposed to a state law claim such is at issue here. This distinction is of no moment given that the Eleventh Amendment applies to bar law suits against states in federal court regardless of the federal or state law nature of the underlying claims in such suits.

In sum, we hold that the district court erred in dismissing Foreman's defamation claim at the pleading stage.[4]

IV.

Foreman next argues that the district court erred in dismissing his claim alleging that Pishko and the City deprived him of his alleged property interest in his particular position at the City Attorney's Office in violation of the Due Process Clause of the Fourteenth Amendment. In the Complaint, Foreman alleges that the Due Process Clause required that he be afforded a name-clearing hearing prior to being demoted, which he did not receive.

Foreman's challenge to the district court's dismissal of his property interest claim is without merit. Whether a plaintiff has a protectable property interest under the Due Process Clause turns upon the plaintiff's property rights under state law. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The district court dismissed Foreman's property interest claim on the basis that, under Virginia law,

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[4] Griffith offers three alternative grounds for affirmance not addressed by the district court. First, Griffith argues the Complaint fails to allege actual malice as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964), when the alleged victim of defamation is a public figure. Second, Griffith claims a qualified privilege under Virginia law. *Larimore v. Blaylock*, 528 S.E.2d 119 (Va. 2000) (collecting cases where court applied doctrine of qualified privilege in cases involving defamatory statements made between co-employees and employers in the course of employee disciplinary or discharge matters). Finally, Griffith argues that Foreman has not alleged any statements that are actually defamatory.

We reject each of these arguments. Accepting the allegations in the Complaint as true and viewing them in the light most favorable to Foreman reveals that: (1) Foreman has sufficiently alleged actual malice as required by *New York Times v. Sullivan*; (2) the same allegation disqualifies Griffith from entitlement to a qualified privilege, *Southeastern Tidewater Opportunity Project v. Bade*, 435 S.E.2d 131, 132-33 (Va. 1993); and (3) the Complaint sufficiently alleges defamatory statements.

"Foreman was an at-will employee who had no constitutionally protected property interest in his continued employment as such." (J.A. 396). We agree.

In the Complaint, Foreman initially concedes that he "was an at-will employee" of the City Attorney's Office. (J.A. 335). By this statement, Foreman appears to acknowledge that Norfolk City Charter § 53 provides that Norfolk City Attorneys are at-will employees, nominated by the City Attorney and appointed by the City Counsel. Norfolk City Charter § 53. Section 53 of the Norfolk City Charter is squarely in accord with Virginia's strong adherence to the common law employment-at-will doctrine. *Bailey v. Scott-Gallagher, Inc.*, 480 S.E.2d 502, 503 (Va. 1997).

However, Foreman attempts to nullify the effect of Norfolk City Charter § 53 by also alleging that:

> The longstanding custom of [the City Attorney's Office] was to terminate or discipline or demote only for just cause. That was the case during Foreman's approximately 17 years of legal service in the City Attorney's office. Foreman recalls no case in which any lawyer-employee was ever terminated, disciplined, or demoted without cause. That understanding was the "common law" of the workplace, and was communicated to Foreman directly and personally by Pishko, the City Attorney, on more than three occasions. It was also communicated to Foreman and others on numerous occasions by Pishko's predecessor, Phil Trapani.

(J.A. 335-336).

Foreman is correct that a common law of a particular institution developed by circumstances of the employee's service can create a property protected by the Due Process Clause of the Fourteenth Amendment. *Perry v. Sinderman*, 408 U.S. 593, 602 (1972) (finding that a "common law" of a particular institution developed by circumstances of the employee's service can also create a property interest). We find the decision of *County of Giles v. Wines*, 546 S.E.2d 721 (Va. 2001), dispositive in that circumstances of the nature alleged by Foreman do not create a common law of the workplace to discharge only for cause in the face of the strong presumption under Virginia common law that an employment relationship in Virginia is at-will.

In *County of Giles*, D. Chad Wines (Wines) sued Giles County, Virginia and its Board of Supervisors following his termination as a County employee without any pre or post termination hearing procedures. *Id.* at 722. Like Foreman, Wines asserted a property interest claim under the Due Process Clause of the Fourteenth Amendment. *Id.* Specifically, Wines alleged that the County and the Board of Supervisors had violated the Due Process Clause of the Fourteenth Amendment by depriving him of his property interested in continued employment with the County, subject to termination only for cause, without providing him name clearing procedures.[5] *Id.* In support of his claimed property interest in continued employment with the County, Wines relied upon the County's Personnel Policy, enacted by its Board of Supervisors. In relevant part, the County's Personnel Policy provided:

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[5] According to Wines, personality conflicts with the County's Board of Supervisors, rather than any fault on his part, resulted in his termination.

8-5 Discharges

> An employee may be discharged for inefficiency, insubordination, misconduct, or other just cause. Discharge may be made by the Department Head with approval of the County Administrator in the case of employees below department head level. The County Adminstrator with the approval of the Board of Supervisors may discharge other employees. A written statement of the reasons for such action shall be furnished the employee and a copy shall be made part of the personnel file of the individual.

Id. at 722. Additionally, § 8-7 of the County's Personnel Policy enumerated "Causes for Suspension, Demotion, or Dismissal." *County of Giles*, 546 S.E.2d at 723. The Jury returned a verdict in favor of Wines. *Id.* at 722.

At the conclusion of Wines' evidence and at the conclusion of all the evidence, the County and the Board of Supervisors made motions to strike Wines' evidence on the basis that Wines was an employee terminable at-will and, therefore, the County was not limited to terminating him solely for cause nor required to provide him with procedural due process in connection with terminating him. *Id.* at 722. The trial court denied all such motions based upon its holding that the County Personnel Policy created an employment contract under which the County could only discharge Wines for cause. *Id.* Thus, the trial court entered an order confirming the jury's verdict in favor of Wines. *Id.* The County and the Board of Supervisors appealed.

On appeal the County and the Board of Supervisors denied that Wines had a constitutionally protected property

interest in his employment position with the County. *Id.* at 724-25. According to the County, under Virginia common law Wines' employment with the County was presumed to be terminable at-will, and the evidence presented at trial was insufficient to rebut the presumption. *Id.* at 723-25. Wines, on the other hand, argues that §§ 8-5 and 8-7 of the County's Personnel Policy created an employment contract guaranteeing him the right to be terminated solely for cause, and that such right translated to afford him a constitutionally protected property interest. *Giles*, 546 S.E.2d at 725.

The Supreme Court of Virginia unequivocally held in favor of the County and the Board of Supervisors. *Id.* at 725. In so doing, the court reiterated the rule that Virginia strongly adheres to the common law employment-at-will doctrine. *Id.* at 723, 725. Under that doctrine, there is a strong rebuttable presumption that an employment relationship is at-will for an indefinite period of time, with either party free to terminate the relationship at any time and for any reason. *Id.* at 723. The court applied this doctrine to the evidence before it and held: "Wines failed to present evidence that he had an employment contract terminable solely for cause sufficient to rebut the employment at-will presumption." *Id.* According to the court:

> Section 8-5 of the County's Personnel Policy does not change the nature of Wines' employment at-will contract with the County. The language upon which Wines relied states that an "employee *may* be discharged for inefficiency, insubordination, misconduct, or other just cause." This sentence does not state that an employee *shall only* be discharged for inefficiency, insubordination, misconduct, or other just

> cause; nor does it state that an employee will not be discharged without just cause. We hold that the personnel policy at issue in this case is not sufficient to rebut the strong presumption in favor of the at-will employment relationship in this Commonwealth.
>
> We note that Wines also relies upon § 8-7 of the County's Personnel Policy which enumerates "Causes for Suspension, Demotion, or Dismissal." However, this section is devoid of any language which changes the nature of the at-will employment relationship between the County and its employees. There is simply no language in this section that limits the County's power to discharge an employee without cause.

Id. The court also held that the County's interim administrator's mistaken belief that Wines could only be discharged for cause was insufficient to change Wines' at-will employment relationship with the County. *Id.* Because Wines failed to establish that he was an employee terminable solely for cause, he had no property right protected by the Fourteenth Amendment. *Id.* at 725. Accordingly, the court reversed the judgment of the trial court with respect to Wines' property interest claim and entered final judgment in favor of the County and the Board of Supervisors. *Id.*

The facts of the present case, taken in the light most favorable to Foreman, are even less compelling than the facts in *Giles*. *Giles* involved written language in a formal personnel policy, which written language at least arguably gave employees the impression that terminations and demotions would be for cause. No such comparable

evidence exists in the present case. Indeed, the only officially issued written directive on the subject, Norfolk City Charter § 53, clearly provides that attorneys in the City Attorney's Office are employees at-will, with no guarantee of continued employment or of a particular rank. The arguable longstanding custom of the City Attorney's Office not to terminate or demote attorneys except for cause coupled with the multiple verbal assurances of similar effect by Pishko and his predecessor are simply insufficient to vitiate the combined force of this express language and the strong presumption of an at-will employment relationship under Virginia law.

In sum, we hold Foreman did not have a property interest in his continued employment nor his particular rank at the City Attorney's Office. Accordingly, he cannot sustain his property interest claim under the Due Process Clause. We, therefore, affirm the district court's Rule 12(b)(6) dismissal of such claim.

V.

Foreman challenges the district court's dismissal of his liberty interest claim alleging that Pishko and the City deprived him of his liberty interest in his professional reputation and future employment opportunities in violation of the Due Process Clause of the Fourteenth Amendment. According to Foreman, the violation occurred when Pishko and the City failed to give him a name-clearing hearing prior to making the Report public and demoting him for reasons contained in the Report. Foreman's liberty interest claim is foreclosed by our decision in *Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990). Accordingly, we affirm the district court's dismissal of this claim.

In *Johnson*, the plaintiff, a public employee who had been demoted and transferred for alleged misconduct on

the job, alleged that his employer's public announcement of the reasons for his demotion without notice and an opportunity to be heard prior to the demotion deprived him of his liberty interests in his reputation and future career opportunities in violation of the Due Process Clause. *Id.* at 998. Following a bench trial, the district court entered judgment in favor of the plaintiff. *Id.*

On appeal, we reversed on the ground that no protectable liberty interest was implicated by the public announcement of the reasons for the plaintiff's demotion. *Id.* at 1000. In this regard, we held that "for a liberty interest to have been implicated, some damage to [the plaintiff's] employment status must have resulted from publication of the reasons for his demotion." *Id.* at 999. Because the plaintiff remained employed for his public employer, we concluded that he suffered no damage to his employment status, and thus, could not be heard to complain that he had been made unemployable as the result of the publication. *Id.* We also concluded that any harm to the plaintiff's chances for career advancement with his public employer did not result from the publication of the reasons for his demotion, but from the reasons from the demotion itself. *Id.* at 999-1000.

In the present case, like the plaintiff in *Johnson*, Foreman remained employed by his public employer after the public announcement of the reasons for his demotion. Accordingly he suffered no damage to his employment status and cannot be heard to complain that he has been made unemployable. Furthermore, any harm that came to Foreman's chances for career advancement with the City Attorney's Office did not result from the publication of the actual reasons for his demotion, but from the actual reasons themselves. In short, even accepting all of the facts in Foreman's complaint as true, Foreman cannot establish that he has been deprived of a liberty interest protected by the

Due Process Clause, and therefore, we affirm the district court's dismissal of Foreman's liberty interest claim against Pishko and the City.[6]

VI.

In conclusion, we: (1) vacate the district court's dismissal of Foreman's defamation claim against Griffith and remand that claim for further proceedings; (2) affirm the district court's dismissal of Foreman's property interest claim; and (3) affirm the district court's dismissal of Foreman's liberty interest claim.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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[6] In support of his liberty interest claim, Foreman makes mention of the following statement in a footnote in *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988): "[A] public employer's stigmatizing remarks do not deprive an employee of a liberty interest unless they are made in the course of a discharge or significant demotion." *Id.* at 172 n.5. Any reliance that Foreman places on this statement in support of his liberty interest claim is misplaced. The statement is not only nonbinding *dicta*, but also pre-*Johnson*, which squarely rejected the idea that a mere demotion can sustain a liberty interest claim.

JUDGMENT

FILED: November 17, 2003

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

NO. 02-2284
CA-02-394-2
CA-02-380-2

ANDRE FOREMAN
Plaintiff - Appellant

and

WILLIAM SUMMS
Plaintiff

v.

CHARLES D. GRIFFITH, JR.;
BERNARD PISHKO; CALVIN DEPEW;
The CITY OF NORFOLK
Defendants - Appellees

ENTERED: November 17, 2003

Appeal from the United States District Court for the
Eastern District of Virginia at Norfolk

In accordance with the written opinion of this Court filed this day, the Court affirms in part and vacates in part the judgment of the District Court.

This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ANDRE FOREMAN,
Plaintiff,

v. CIVIL ACTION NO. 2:02cv380

CHARLES D. GRIFFITH, JR., et al.,
Defendants.

WILLIAM SUMMS,
Plaintiff,

v. CIVIL ACTION NO. 2:02cv394

CHARLES D. GRIFFITH, JR., et al.,
Defendants.

ENTERED: October 3, 2002

DISMISSAL ORDER

This matter is before the Court on Defendants' Renewed Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth herein, Defendants' Motion to Dismiss is **GRANTED**, and these actions are **DISMISSED**.

I. Factual and Procedural Background

In 1997, the Norfolk Police Department and the Office of the Commonwealth's Attorney for the City of Norfolk began a joint investigation into the City of Norfolk's April 15, 1997, towing contract with Tidewater Towing Services.

The investigation spanned four years, and ultimately culminated in a report "Investigation into the 1997 Norfolk City Towing Contract" (hereinafter "The Report"). The Report was written by Defendant Griffith, the Commonwealth's Attorney for Norfolk, and was distributed to the City Manager, the Mayor, City Attorney Pishko, the members of the City Council, and members of the press. While the Report found that there had been inappropriate contacts between Plaintiff Foreman, who was an Assistant City Attorney for Norfolk at the time of the investigation, and Tidewater Towing, especially its then-owner Plaintiff Summs, it concluded Plaintiffs' actions were not criminal. Additionally, the Report criticized the system of public procurement utilized in awarding the contract. The above-referenced actions relate directly to the Report, its release on March 27, 2000, and its subsequent references in local newspaper articles.

Plaintiff Foreman and Summs each filed a Motion for Judgment and then an Amended Motion for Judgment in the Circuit Court for the City of Fairfax. In their respective complaints, Plaintiffs alleged defamation of character, intentional infliction of emotional distress, violation of due process and equal protections rights, and conspiracy. On April 11, 2002, the cases were then removed to the United States District Court for the Eastern District of Virginia, and on May 21, 2002, they were transferred to the Norfolk Division.

On April 18, 2002, Defendants filed various motions including a Motion to Dismiss and a Motion for a More Definitive Statement. The cases were subsequently consolidated on June 19, 2002, and a hearing on Defendants' motions was held before this Court on July 31, 2002. At the hearing, Plaintiffs indicated their intention to voluntarily dismiss their due process and equal protection claims against Defendants Griffith and Depew and their conspiracy

claims against all Defendants. Those claims were subsequently dismissed by this Court on August 1, 2002. The Court also dismissed Plaintiff's claims of intentional infliction of emotional distress claims, Plaintiff Foreman's claim of defamation of character when Defendant Pishko sent a letter to Alfred Coker, and Plaintiff Summs' claim of defamation of character when Defendant Depew sent a letter about Plaintiff Foreman to the Virginia State Bar. The Court then ordered Plaintiffs to file a More Definitive Statements, and Plaintiffs complied on August 12, 2002. Upon Plaintiffs' request in their More Definitive Statement, the Court dismissed the following claims: (1) Plaintiffs' defamation of character claims against Defendants Pishko, Depew, and the City of Norfolk; (2) Plaintiff Foreman's claim of due process and equal protection violations against Defendant Depew; (3) Plaintiff Summs' claim of due process and equal protection violations against Defendants Pishko and Depew; (4) the property interest component of Plaintiff Summs' claim of due process and equal protection violations. On August 23, 2002, Defendants then filed a Renewed Motion to Dismiss. All of the parties to the present action have agreed to submit Defendants' Renewed Motion to Dismiss to the Court on the basis of the briefs and prior oral argument.

With regard to the counts that remain, Plaintiffs Foreman and Summs allege that Defendant Griffith defamed them upon the release of the Report and every time the Report was subsequently quoted by the press. Plaintiff Foreman further alleges that Defendants Pishko and the City of Norfolk violated his due process rights under 42 U.S.C. § 1983 by refusing a public hearing either before or after his demotion and by damaging his personal and professional reputation. Similarly, Plaintiff Summs in his Amended Motion for Judgment alleges that Defendant City of Norfolk violated his due process rights under 42 U.S.C. § 1983 by refusing a public hearing either before or after his demotion and by damaging his personal and professional

reputation. The language in Plaintiff Summs' Amended Motion for Judgment was apparently copied verbatim from Plaintiff Foreman's Amended Motion for Judgment, and it is clearly in error because Plaintiff Summs was never an employee of the City of Norfolk. In his More Definitive Statement, Plaintiff Summs clarifies that his due process rights, more specifically his liberty interests, under 42 U.S.C. § 1983 were violated when the City of Norfolk refused to renew the towing contract with Tidewater Towing.

II. Legal Analysis

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) permits a party to move the Court to dismiss an action if the plaintiff fails to state a claim upon which relief can be granted. The function of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. Neitzke v. Williams, 409 U.S. 319, 326-27, 109 S. Ct. 1827, 1833, 104 L.Ed.2d 338 (1989). When considering a motion made pursuant to Rule 12(b)(6), the Court is generally limited to a review of the pleadings filed in the case. Exhibits attached to the pleadings are considered a part of the complaint. Fed.R.Civ.P. 10(c). Thus, "[i]n ruling on a 12(b)(6) motion, the Court can rely only upon the allegations in the complaint and those documents attached as exhibits or incorporated by reference." Norfolk Fed'n of Bus. Districts. v. Dep't of Hous. and Urban Dev., 932 F. Supp. 730 (E.D.Va. 1996). See also, Huntingdon Life Sciences, Inc. v. Rokke, 986 F. Supp. 982, 985 (E.D.Va. 1997); Davis, 896 F. Supp. at 566; Simons v. Montgomery County Police Officers, 762 F.2d 30, 31 (4th Cir. 1985), *cert. denied*, 747 U.S. 1054 (1986).

The Fourth Circuit has held that a motion to dismiss under Rule 12(b)(6) should only be granted in "very limited circumstances." Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). However, dismissal is

appropriate if it appears that the plaintiff is not "entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." Harrison v. United States Postal Serv., 840 F.2d 1149, 1152 (4th Cir. 1988)(citation omitted). See also, Davis v. Hudgins, 896 F.Supp. 561, 566 (E.D.Va. 1995)(citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Schatz v. Rosenberg, 943 F.2d 485, 489 (4th Cir. 1991). When reviewing the legal sufficiency of a complaint, the Court must construe the factual allegations "in the light most favorable to plaintiff." Schatz, 943 F.2d at 489 (quotation omitted). See also, Davis, 896 F.Supp. at 566 (citing Martin Marietta Corp. v. Int'l Telecomm. Satellite Org., 991 F.2d 94, 97 (4th Cir. 1992)).

B. Sovereign Immunity

The jurisdiction of the federal courts is limited by the Eleventh Amendment. California v. Deep Sea Research, Inc., 523 U.S. 491, 501, 118 S. Ct. 1464 (1998). The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Although seemingly applicable only to federal courts' diversity jurisdiction under Article III, the Supreme Court has broadly interpreted the Eleventh Amendment. It is now widely accepted that the Eleventh Amendment grants each state sovereign immunity from lawsuits brought by private citizens, even citizens of its own state. "Suits against state officials in their official capacities are considered suits against the state." Shepard v. Irving, 204 F.Supp.2d 902, 912 (E.D.Va. 2002). Thus, as Supreme Court precedent concerning the Eleventh Amendment dictates, state officials are immune from suit in federal court for actions taken in their official capacity. Deep Sea Research, 523 U.S. at 503

(citing Smith v. Reeves, 178 U.S. 436, 20 S. Ct. 919, 44 L.Ed. 1140 (1900)).

While the Eleventh Amendment bars state officials from being sued in their official capacities, it does not prevent state officials from being sued in their individual capacities for acts performed in the course of their official duties nor does it bar state officials from being sued individually for their tortious conduct. Russ v. Uppah, 972 F.2d 300 (10th Cir. 1992); Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985). A plaintiff who wishes to sue a state official in his personal capacity must specify so in his complaint. Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989). When a plaintiff's complaint is silent about the capacity in which he is suing the defendant, the Court is to interpret the complaint as including only-official capacity claims, even if defendant is only referred to by name rather than official capacity. Egerdahl v. Hibbing Community College, 72 F.3d 615, 619 (8th Cir. 1995).

In regard to the case currently before this Court, all of the remaining defamation counts are against Defendant Griffith. At all times relevant to the case at hand, Defendant Griffith was the Commonwealth Attorney for the City of Norfolk. It goes without saying that the Commonwealth Attorney is an agent of the state. Defendant Griffith is, therefore, entitled to sovereign immunity under the Eleventh Amendment for all actions taken in his official capacity. Plaintiffs could have sued Defendant Griffith in his individual capacity, but they did not do so. Nowhere in either their Amended Motions for Judgment or their More Definitive Statement do Plaintiffs state that they are suing Defendant Griffith in his individual capacity. Indeed, the Amended Motion for Judgment indicates Defendant Griffith's business address, thereby providing evidence that Defendant Griffith was in fact sued in his official capacity. Moreover, the investigation

was performed by Griffith only because Griffith was the prosecuting attorney. Absent any specific statement by Plaintiffs of their intention to sue Defendant Griffith in his individual capacity, this Court finds that Plaintiffs sued Defendant Griffith in his official capacity only.

The question then becomes whether the Report was authored and released by Defendant Griffith in the course of his official duties as the Commonwealth Attorney for the City of Norfolk. Without a doubt, it was. For several years, the Norfolk Police Department and the Commonwealth Attorney's office had been conducting a joint investigation into the propriety of the City of Norfolk's towing contract with Tidewater Towing. As the Commonwealth Attorney for the City of Norfolk, this Court believes that it was Defendant Griffith's official responsibility to report on the findings of the investigation. To find otherwise would thwart similar investigations into possible government corruption. Defendant Griffith carried out his official responsibility by authoring the Report which he sent to the Norfolk Mayor, the Norfolk City Manager, and the Norfolk City Attorney on March 27, 2000. There are no facts before this Court to indicate that Defendant Griffith acted outside the scope of his official capacity. Indeed, the facts before this Court indicate that Defendant Griffith conducted himself with the utmost regard for his official responsibilities.

To summarize, the Court finds that Defendant Griffith was sued in his official capacity for actions taken pursuant to his official capacity as the Commonwealth Attorney for the City of Norfolk. As such, the Court holds that Defendant Griffith is entitled to sovereign immunity pursuant to the Eleventh Amendment. Therefore, Plaintiffs have failed to state a claim upon which relief can be granted and the Court hereby **DISMISSES** all of Plaintiff's claims of defamation of character against Defendant Griffith.

C. 42 U.S.C. § 1983

To establish a claim under 42 U.S.C. § 1983, a plaintiff must allege facts sufficient to show that his rights under the Constitution or the laws of the United States were violated by a person acting under the color of state law. 42 U.S.C. § 1983. See also, Maine v. Thiboutot, 428 U.S. 1, 100 S. Ct. 2502, 65 L.Ed.2d 555 (1980). In this case, Plaintiff Foreman claims that his rights under the Equal Protection and Due Process Clauses of the Constitution were violated, and Plaintiff Summs alleges that his rights under the Due Process Clause of the Constitution were abridged. Thus, the issue presently before this Court is whether the Plaintiffs have alleged facts sufficient to show that their rights under either the Equal Protection Clause or the Due Process Clause of the Constitution were violated.

1. Plaintiff Foreman's Equal Protection Claim

Nowhere in either his Amended Motion for Judgment or his More Definitive Statement does Plaintiff Foreman specify facts tending to show that he was denied the equal protection of the laws in violation of 42 U.S.C. § 1983. With regard to his equal protection claim, Plaintiff Foreman has failed to meet the liberal pleading requirements of the Federal Rules of Civil Procedure. Thus, to the extent that Plaintiff Foreman was claiming a equal protection violation, his claim is hereby **DISMISSED** for failure to state a claim upon which relief can be granted.

2. Plaintiff Foreman's Due Process Claim

Plaintiff Foreman alleges that both his constitutionally protected property and liberty interests

were abridged in violation of the Due Process Clause of the Constitution. More specifically, Plaintiff Foreman claims that he "had a constitutionally protected property interest in his position, pay and benefits, and a liberty interest in his personal and professional reputation." Pl's Amended Motion for Judgment ¶60. This Court disagrees.

To establish a deprivation of a property interest under the Due Process Clause, a plaintiff must show that state law rules and understandings provide a "sufficient expectation of continued employment." Jenkins v. Weatherholtz, 909 F.2d 105, 107 (4th Cir. 1990) (quoting Bishop v. Wood, 426 U.S. 341, 344 (1976)). See also, Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)(noting that a plaintiff possess a property right in continued employment before any constitutional due process rights are triggered). "A local government employee serving at the will and pleasure of the government employer has no legitimate expectancy of continued employment and thus has no protectible property interest." Id. Under Virginia law, no property interest is created by at-will employment. Skeeter v. City of Norfolk, 681 F.Supp. 1149, 1155 (E.D.Va. 1987). In Norfolk, Assistant City Attorneys are at-will employees nominated by the City Attorney and appointed by the City Counsel. Norfolk City Charter § 53. Indeed, Plaintiff Foreman acknowledges that he was an at-will employee. Pl's More Definitive Statement ¶IG2. Plaintiff Foreman argues that it was the "common law" understanding of the workplace that no lawyer-employee was ever terminated, disciplined, or demoted without cause. The Court is not persuaded. It is the state law rules and understandings that govern, not workplace understandings. Thus, the Court finds that Plaintiff Foreman was an at-will employee who had no constitutionally protected property interest in his continued employment as such.

To establish a deprivation of a liberty interest under the Due Process Clause of the Constitution, a plaintiff must allege facts sufficient to "imply the existence of serious character defects such as dishonesty or immorality." Robertson v. Rogers, 679 F.2d 1090, 1092 (4th Cir. 1982). The Supreme Court has unequivocally held that reputation alone is not a liberty interest entitled to constitutional protection. Siegert v. Gilley, 500 U.S. 226, 233 (1991); Paul v. Davis, 424 U.S. 693, 712 (1976). Plaintiff Foreman claims that the violation of his due process rights came from the allegedly "defamatory Report coupled with the demotion and ruination of Foreman's standing and associations within his profession." Pl's More Definitive Statement ¶IG1. Therefore, it appears that Plaintiff Foreman is claiming that his constitutionally protected liberty interest is his reputation and his employment as an Assistant City Attorney with the City of Norfolk. This claim lacks merit. As previously discussed, Plaintiff Foreman was an at-will employee. As such, he lacked an expectation of continued employment, and therefore, he had no constitutionally protected interests with regard to his employment. Moreover, as dictated by the Supreme Court precedent, Plaintiff Foreman had no constitutionally protected liberty interest in his reputation. Thus, neither of the interests that Plaintiff Foreman points to are sufficient, either individually or coupled together, to state a constitutionally protected liberty interest.

Plaintiff Foreman has failed to state either a constitutionally protected property or liberty interest. Absent a constitutionally protected property or liberty interest, there can be no claim of a violation of the Due Process Clause of the Constitution and 42 U.S.C. § 1983. Therefore, Plaintiff Foreman has failed to state a claim upon which relief can be granted. Plaintiff Foreman's claim under 42 U.S.C. § 1983 is hereby **DISMISSED**.

3. Plaintiff Summs' Due Process Claims

In support of his claim under 42 U.S.C. § 1983, Plaintiff Summs alleges that he had a constitutionally protected liberty interest. Unlike Plaintiff Foreman, Plaintiff Summs is not alleging that he had a constitutionally protected property interest. In regard to the constitutionally protected liberty interest, Plaintiff Summs' argument is plagued by the same problems as Plaintiff Foreman's. In fact, Plaintiff Summs makes essentially the same argument as Plaintiff Foreman. Plaintiff Summs argues that the "defamatory report coupled with the non-renewal [of the towing contract], seriously damaged Summs' standing and associations within his business community and city contracting officials generally". Pl's More Definitive Statement ¶IIBB 1. In a nutshell, Plaintiff Summs is complaining about alleged damage to his reputation. The non-renewal of the towing contract is a non-issue in this case. Not only did Plaintiff Summs have no protected interest in the continuation of the towing contract, but Plaintiff Summs was no longer the owner of Tidewater Towing at the time of the non-renewal. Thus, Plaintiff Summs claim is solely reputational. Yet the law is clear that reputation cannot form the basis of a constitutionally protected liberty interest. Plaintiff Summs has failed to state a constitutionally protected liberty interest, and absent such an interest, there can be no claim of a violation of the Due Process Clause of the Constitution and 42 U.S.C. § 1983. Therefore, Plaintiff Summs has failed to state a claim upon which relief can be granted. Plaintiff Summs' claim under 42 U.S.C. § 1983 is hereby **DISMISSED**.

III. Conclusion

For the reasons discussed herein, the Court holds that Plaintiffs have failed to state any claim upon which relief can be granted. The Court hereby **GRANTS**

Defendants Renewed Motion to Dismiss and **DISMISSES** Plaintiffs' complaint.

The Clerk of the Court is **INSTRUCTED** to forward a copy of this Order to all counsel of record.

IT IS SO ORDERED.

/s/Robert G. Doumar
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
October 3, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 12, 2003

No. 02-2284
CA-02-394-2
CA-02-380-2

ANDRE FOREMAN
Plaintiff - Appellant

and

WILLIAM SUMMS
Plaintiff

v.

CHARLES D. GRIFFITH, JR.; BERNARD PISHKO; CALVIN DEPEW; The CITY OF NORFOLK
Defendants - Appellees

ENTERED: December 12, 2003

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Wilkins and Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
CLERK

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF FAIRFAX

ENTERED: February 19, 2002

ANDRE FOREMAN Plaintiff,	)	
v	)	
CHARLES D. GRIFFITH, JR., **Serve:** Circuit Court for City of Norfolk 100 St. Paul's Boulevard Norfolk, VA 23510 Tel: 757/664-4593	)	
and	)	At Law No: 194542
BERNARD PISHKO, **Serve:** City of Norfolk Attorney's Office 810 Union Street Norfolk, VA 23510 Tel: 757/664-4529	)	
and	)	
CALVIN DEPEW, **Serve:** Commonwealth's Attorney's Office 2425 Nimmo Parkway Virginia Beach, VA 23456 Tel: 757/427-4401	)	
and	)	

THE CITY OF NORFOLK,)
Serve: Bernard Pishko,)
City Attorney)
City of Norfolk Attorney's Office)
810 Union Street)
Norfolk, VA 23510)
Tel: 757/664-4529)
)
Defendants.)

AMENDED MOTION FOR JUDGMENT

COMES NOW, Plaintiff, Andrew Foremen by counsel, and files this Amended Motion for Judgment which replaces the original Motion for Judgment filed herein on March 4, 2001, against the defendants jointly and severally and states for his causes of action the following:

1. Plaintiff Andre Foremen was, at all times pertinent herein, an attorney licensed to practice law in the Commonwealth of Virginia. He resides at 113 North Shore Road, Norfolk, VA 23502 and is a citizen of the state of Virginia.

2. Defendant Charles D. Griffith, Jr. was, at all times pertinent herein, the Commonwealth's Attorney for the City of Norfolk.

4. Defendant Bernard Pishko was, at all times pertinent herein, City Attorney for the City of Norfolk whose office employed Andre Foreman as a deputy or assistant City attorney.

5. Defendant Calvin Depew, was, at all times pertinent herein, Deputy City Attorney for the City of Norfolk, Virginia.

6. Defendant City of Norfolk is an incorporated municipality of the Commonwealth of Virginia.

7. Venue and jurisdiction are proper in this matter.

FACTS

8. The genesis of this case is the culmination of a four-year investigation by the Norfolk Police Department and the office of the Commonwealth's Attorney for the City of Norfolk, Virginia, into the Defendant City of Norfolk's April 15, 1997, towing contract with Tidewater Towing Service, Inc. (hereinafter "Tidewater Towing"), and the role of Andre Foreman, as Deputy City Attorney, and William Summs, as owner and chief executive officer of Tidewater Towing, in the award and execution of the contract.

9. The investigation uncovered insufficient evidence of criminal or civil violation of law by either William Summs or plaintiff Andre Foreman.

10. The investigation concluded with a report (herinafter "Report") authored by defendant Griffith and his office that was published by one or more of defendants by distribution, *inter alia*, to the City manager, the Mayor, defendant Pishko, all Members of the City

Council, and members of the press or others. A copy of this Report is attached hereto as Exhibit "A" and made part by reference hereof.

11. Defendants intended and knew that the Report would be published and re-published by the media as the controversy continued over the City's towing contract and the involvement of plaintiff. Indeed, defendant Griffith released the Report to print and broadcast media, and this defendant and the other defendants are believed to have spoken to various media representatives about it. The publications of the Report commenced on March 28, 2000 and continued on various dates thereafter, including but not limited to articles published in the local paper on or about, March 28, 2000, March 29, 2000, March 30, 2000, April 5, 2000 and April 19, 2000. These articles are attached and incorporated herein as Exhibit "B."

12. Defendant Calvin Depew filed a grievance with the Virginia State Bar after the initial publication of the Report which included a copy thereof. However, Depew declined to be a complainant to the Bar, and therefore, there can be no claim of privilege for this republication. There were other publications and republications of this report which severely damaged plaintiff.

13. There were other publications and republication of this report which severely damaged plaintiff. All publications and republication were caused and proximately

caused on the acts and publications of the defendants.

14. The Report, by assertion of fact, implication, inference, insinuation and innuendo, maliciously, recklessly and falsely maintained that Plaintiff Foreman was guilty of reprehensible and unethical conduct and favoritism towards William Summs and his company.

15. These false statements and innuendoes would lead a reasonable citizen to conclude that Plaintiff was a corrupt lawyer, unfit to perform his duties as a city employee, and probably guilty of criminal conduct involving moral turpitude.

16. The publication and republication of the Report damaged the Plaintiff's professional and personal reputation for competence and integrity and humiliated him.

17. Defendant Pishko, knowing the falsity of the defamatory statements and innuendoes in the Report, invoked it to demote and reassign Plaintiff to lesser duties at substantially lesser pay, which also caused additional harm to Plaintiff's professinal standing and reputation.

18. Defendant Pishko also refused to make an apology or any public statement to clear Foreman's reputation.

19. Defendant Pishko took this adverse personnel action without affording Plaintiff

Foreman an opportunity to be heard despite Plaintiff's several requests to present evidence in an official pre-termination hearing to publicly clear his good name and to remain in his job. Defendant City of Norfolk likewise refused plaintiff's request for such a hearing.

20. Plaintiff's demotion, re-assignment, and professional degradation caused by Defendant Pishko, and Defendants generally, caused Plaintiff Foreman to lose an opportunity to be elected by the Virginia General Assembly as a Juvenile and Domestic Relations Judge.

21. The Report's statements and innuendoes inferred the Plaintiff was corrupted by William Summs in the performance of his official duties in that the towing contract was steered to Tidewater Towing, the terms of the contract were altered to favor Tidewater Towing, and that plaintiff showed favor to Summ's company in other ways to the City's detriment.

22. The Report's statements and innuendoes alleged above were false and made with malice, recklessness, or negligence actuated by personal motives of spite and ill-will on the part of the defendants.

23. The defamatory, slanderous, and libelous publications of the Report were made by defendants without notice or an opportunity to be heard by plaintiff Foreman to clear his good name and maintain his good standing

within his profession and the community at large. Plaintiff's resume is attached and incorporated herein as Exhibit "C," as evidence of plaintiff's excellent reputation and professional achievements in positions of trust and honor.

CAUSES OF ACTION

24. Plaintiff incorporates paragraphs 1-23 as if re-alleged herein.

25. Defendants jointly and severally defamed plaintiff by their malicious, reckless, and/or negligent actions in publishing, causing to be published, and republishing the false Report, and by their additional false statements to the media in commenting thereon. Defendants jointly and severally intentionally and/or negligently inflicted emotional distress on Plaintiff by their actions in publishing and republishing the false Report and falsely commenting to the media thereon.

26. As a direct result of defendants' actions in publishing and republishing the Report, plaintiff has suffered loss of personal and professional reputation. He has lost income and been compelled to incur expenses including for legal services. He has suffered emotional distress. He has sustained compensatory losses. Moreover, he is entitled to receive an amount as punitive damages, and for expenses including legal fees and costs.

27. Much of the alleged defamation is defamatory per se.

28. Defendants jointly and severally violated the constitutional rights of plaintiff by causing him to suffer in his profession, in conjunction with the publishing and republishing of the false Report and making false comments thereon to the media without an opportunity for a hearing, thus depriving defendant of a liberty interest in his personal and professional reputation and a property interest in his business and income without due process and equal protection under the law.

COUNT I

Defamation of Character

29. Plaintiff incorporates paragraphs 1-28 as if re-alleged herein.

30. The defendants, jointly and severally, knowingly, recklessly and with malice defamed the plaintiff as aforementioned on March 28, 2000. At the time the defamatory statements were made, the defendants knew or should have known that they were in false.

31. The allegations contained in the defamatory statements were in fact false.

32. The plaintiff has suffered, and continues to suffer damages resulting from this defamation of him by Defendants.

COUNT II

Defamation of Character

33. Plaintiff incorporates paragraphs 1-32 as if re-alleged herein.

34. The defendants, jointly and severally, knowingly, recklessly and with malice defamed the plaintiff as aforementioned on March 29, 2000. At the time of the publication of the defamatory statements, defendants knew or should have known that the statements were in fact false.

35. The allegations contained in the defamatory statements were in fact false.

36. The plaintiff has suffered, and continues to suffer damages resulting from this defamation of him by Defendants.

COUNT III

Defamation of Character

37. Plaintiff incorporates paragraphs 1-36 as if re-alleged herein.
The defendants, jointly and severally, knowingly, recklessly and with malice defamed the plaintiff as aforementioned on March 30, 2000. At the time of the publication of the defamatory statements, the defendants knew and/or should have known that the statements were in fact false.

38. The allegations contained in the defamatory statements were in fact false.

39. The plaintiff has suffered, and continues to suffer damages resulting from this defamation of him by Defendants.

COUNT IV

Defamation of Character

40. Plaintiff incorporates paragraphs 1-39 as if re-alleged herein.

41. The defendants, jointly and severally, knowingly, recklessly and with malice defamed the plaintiff as aforementioned on April 5, 2000. At the time of the publication of the defamatory statements, the defendants knew and/or should have known that the statements were in fact false.

42. The allegations contained in the defamatory statements were in fact false.

43. The plaintiff has suffered, and continues to suffer damages resulting from this defamation of him by defendants.

COUNT V

Defamation of Character

44. Plaintiff incorporates paragraphs 1-43 as if re-alleged herein.

45. On or about April 6, 2000, defendant Pishko libeled Plaintiff in a letter to Alfred D. Coker. In this letter, Pishko said he "counseled Mr. Foreman on [Coker's complaint] and other personnel relationship matter," and cited

"news" reports inferring that Pishko had to take adverse actions against plaintiff because of news reports implicating Mr. Foreman as a corrupt lawyer-employee.

46. This April 6th letter is attached and incorporated herein as Exhibit "D".

COUNT VI

Defamation of Character

47. Plaintiff incorporates paragraphs 1-46 as if re-alleged herein.

48. The defendants, jointly and severally, knowingly, recklessly and with malice defamed the plaintiff as aforementioned on April 19, 2000. At the time of the publication of the defamatory statements, the defendants knew and/or should have known that the statements were in fact false.

49. The allegations contained in the defamatory statements were in fact false.

50. The plaintiff has suffered, and continues to suffer damages resulting from this defamation of him by defendants.

COUNT VII

Defamation of Character

51. Plaintiff incorporates paragraphs 1-50 as if re-alleged herein.

52. Defendant Calvin Depew submitted a letter to the Virginia State Bar after the initial publication of the Report which included a copy thereof.

53. By declining to be a complainant there can be no claim of privilege for this republication.

54. The plaintiff has suffered, and continues to suffer damages resulting from this defamation of him by defendant.

COUNT VIII

Intentional Infliction of Emotional Distress

55. Plaintiff incorporates paragraphs 1-54 as if re-alleged herein.

56. The defendants, both individually and in conjunction with one another, by their actions, intentionally, knowingly, recklessly and with malicious intent, inflicted emotional distress upon the plaintiff with callous disregard for the plaintiff's rights and mental well-being.

57. That in fact, the plaintiff was caused to suffer severe emotional distress by the actions of the defendants. Such distress includes, but is not limited to, anxiety, uncontrollable anger, fear, distress in sleep patterns, severe depression and mood swings.

58. The plaintiff's distress is continuing, ongoing and severe and was solely caused by the intentional actions of the defendants previously alleged.

COUNT IX

Violation of Plaintiff's Due Process and Equal Protection Rights

59. Plaintiff incorporates paragraphs 1-58 as if re-alleged herein.

60. Plaintiff has a constitutionally protected property interest in his position, pay and benefits, and a liberty interest in his personal and professional reputation.

61. Defendants, in refusing Plaintiff a public hearing either before or after his demotion, and an opportunity to clear his good name, have taken his property interest and damaged his liberty interest irreparably without due process and equal protection of the law under the United States and Virginia Constitutions and 42 U.S.C. §1983.

COUNT X

Conspiracy

62. Plaintiff incorporates paragraphs 1-61 as if re-alleged herein.

63. Defendant's conspired to violate plaintiff's rights alleged in Count IX above in violation of Title 42 U.S.C. §1985.

CLAIM FOR RELIEF

WHEREFORE, your plaintiff, Andre Foreman, prays for the following relief:

1. That this court enter judgment against the Defendants, in favor of the Plaintiff, for the claims found in Counts I through X;

2. That the plaintiff be awarded compensatory damages in the sum of Four Million dollars ($4,000,000.00) to be paid by the defendants, jointly and severally, for their liability to the plaintiff arising in his causes of action Counts I through X;

3. That the plaintiff be awarded punitive damages against the defendants for their wanton, willful, reckless, and malicious actions against the plaintiff in the sum of Two Million Dollars ($2,000,000.00) on each count;

4. That this court award his attorney's fees and costs expended in this litigation; and

5. That the Court award any other such relief that the Court deems just under the circumstances.

JURY DEMAND

A trial by jury on the merits is demanded by the plaintiff.

Respectfully submitted,

ANDRE FOREMAN
By Counsel

/s/ Gilbert K. Davis by Diane D. Stanley
Gilbert K. Davis, Esquire
VSB#4683
DAVIS & STANLEY, LLC
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COMMONWEALTH OF VIRGINIA

OFFICE OF THE COMMONWEALTH'S ATTORNEY
CITY OF NORFOLK
Suite 600
800 E. City Hall Avenue
Norfolk, Virginia 23510-2719
(757) 664-4444

March 27, 2000

Ms. Regina V.K. Williams, City Manager
Office of the City Manager
11th Floor, City Hall Building
Norfolk, Virginia 23510

RE: Investigation into the 1997 Norfolk City Towing Contract

Dear Regina:

On February 20, 1997 tow trucks from Tidewater Towing Service, Inc. [hereinafter "Tidewater Towing"] towed several cars from a parking lot at 1355 De Bree Avenue in the city of Norfolk, Virginia. Based upon citizen complaints regarding these tows, the Norfolk Police Department initiated an investigation into the activities of Tidewater Towing, 1195 Lance Road, Norfolk, Virginia. During this investigation information revealed that criminal activities had occurred at Atlantic Auto Auction, 1195 Lance Road [auction site 101 Liberty Street, Chesapeake, Virginia] over the course of several years whereby Atlantic Auto Auction had underreported the sales prices of auctioned cars to the beneficiaries of the sales. William Summs owned both Tidewater Towing and Atlantic Auto Auction [the two entities were corporately related].

While the Norfolk Police Investigation into Tidewater Towing was still ongoing, the city of Norfolk awarded a consolidated Towing contract on April 15, 1997 to Tidewater Towing. This contract [hereinafter referenced as the "1997 City Towing Contract"] consolidated in one contract the removal and disposal of motor vehicles towed pursuant to Sections 29-58, 25-591 and 25-593 of the Code of the City of Norfolk, Virginia, 1979, as amended.

During the police investigation into the February 20, 1997 towing incident and Tidewater Towing, police investigators received information from both past and present employees of Tidewater Towing that raised questions concerning the propriety of Tidewater Towing's receipt of the 1997 City Tow Contract as well as the terms of the contract. Additional concerns surfaced involving the nature of the relationship of Deputy City Attorney Andre Foreman of the Office of the City Attorney, Norfolk with Tidewater Towing.

On January 4, 1999 Barry Rudiger, the General Manager of Tidewater Towing_ through April of 1997 responsible for day to day operations of both Tidewater Towing and Atlantic Auto Auction, plead guilty to three counts of misdemeanor embezzlement in Norfolk Circuit Court. Rudiger was sentenced to thirty-six (36) months in the Norfolk City Jail the execution of which was suspended on several conditions including restitution and Rudiger's cooperation with the ongoing investigation of Tidewater Towing.

On behalf of the Norfolk Police Department and my office, I hereby forward the following information and attached documents gathered during our investigation. I have included, where appropriate, analysis with respect to insights on city operations suggested by the investigation.

FINDINGS

The investigation conducted by the Norfolk Police Department and by the Office of the Commonwealth's Attorney documented not only issues regarding the manner in which the 1997 City Tow Contract was awarded but also the nature of the relationship between city employees and city contractors. These findings highlight not only questionable actions but also apparent systemic flaws in the contracting process for towing services in Norfolk:

1) **Over Centralization of Authority in City Government Regarding Towing Issues:** By the spring of 1997 in Norfolk, Virginia several offices of city government had, in essence, abdicated any authority to act with respect to the administration or review of towing matters to the Office of the City Attorney in Norfolk, specifically Deputy City Attorney Andre Foreman. Foreman was cloaked both in the role of the impartial legal advisor to the city of Norfolk with respect to all towing concerns as well as being the equivalent of a partisan departmental officer for towing issues. During the time period leading up to the awarding of the 1997 City Tow Contract, Foreman served as an action officer in the towing field, as an advocate on behalf of a city-wide towing strategy, and as the impartial legal officer for the city tasked with drafting the contracts and providing legal advice to the participants. Once the contracting process was initiated, the Towing Advisory Board created by the city of Norfolk could not, by definition, serve as a counterbalance during the contracting process. There was no effective check and balance system on decision-making in the towing field.

2) **Appearance of a Conflict of Interest**: From at least 1993 onward the primary officers of Tidewater Towing [William Summs and Barry Rudiger] maintained a personal relationship with Deputy City Attorney Foreman that benefited Tidewater Towing and impacted the administration of towing contracts in Norfolk, Virginia. This relationship involved regular meetings [to include in excess of twenty-five (25) meetings at the Town Point Club over several years] between Foreman and representatives of Tidewater Towing, according to Rudiger. At such meetings the status of towing contracts in the city of Norfolk, the position of Tidewater Towing with respect to these contracts, and the ramifications of towing regulations were routinely discussed. Summs and Rudiger would discuss with Foreman their thoughts on the content of prospective towing regulations. The discussion included how contracts could be structured to allow the towing company to make a greater profit.

The investigation indicates that after such discussion the structure of city contracts in the towing field was changed to make them more advantageous to Tidewater Towing. Tidewater Towing set, and then attained, the goal of receiving the primary towing contracts for the city of Norfolk. There was no evidence revealed during the investigation to indicate Foreman had similar meetings or a similar relationship with any other towing contractors. In fact, Foreman's relationship with other towing contractors was extremely circumspect. Finally, after the receipt of the 1997 City Towing Contract, this investigation documented that Foreman had repeatedly interceded on Tidewater Towing's

behalf with representatives of the Norfolk Police Department with respect to regulations governing the processing, storage and auction of impounded vehicles.

Foreman reportedly provided legal advice to Tidewater Towing with respect to towing issues encountered by Tidewater towing. Further, the investigation details that during the evaluation portion of the con.acting procedure for the 1997 City Tow Contract Foreman provided advice to Tidewater Towing as to the drafting and distribution of correspondence concerning issues raised during the contracting process.

3) **Inappropriate Receipt of Gifts:** Deputy City Attorney Foreman over several years received gifts [arguably of de minimus value] from Tidewater Towing. These gifts included automotive work from 1993 to 1997 performed on Foreman's car by employees of Tidewater Towing at Tidewater Towing's 1195 Lance Road location at either cost or gratis. The lot at 1195 Lance Road was not generally an "open to the public" service facility as it was used for work on the auction car and towing equipment. Tidewater Towing arranged for Foreman to use one of the dealer cars while his car was being serviced. The timing of the work on Foreman's car coincided with periods during which city towing contracts were bid. Foreman also received varied other gifts including tickets to golf and tennis tournaments, as well as boxes of Cuban cigars from representatives of Tidewater Towing.

4) **Form of Contracting Procedure Utilized by City of Norfolk:** The contracting process chosen to award the 1997 City Towing Contract ["Competitive Sealed

Proposals" with certain base criteria] implicitly created a more subjective rationale with respect to the awarding of a contract. Given the fact that within the city of Norfolk essentially one man had been acknowledged as the primary gatekeeper in towing matters, the utilization of a subjective-analysis oriented contracting procedure increased the chances of collusion. The investigation indicated that the criteria emphasized for the review of the bidders from the 1997 City Tow Contract were designed to make Tidewater Towing the only responsive bidder.

5) **Opposition to Awarding of Contract to Tidewater Towing:** The Norfolk Police Department strongly opposed the awarding of the 1997 City Tow Contract to Tidewater Towing based upon past experience with the business operations of Tidewater Towing. The prophetic nature of these concerns raised by the Norfolk Police Department were born out by the problematic history of Tidewater Towing's first year of operation under the new contract from 1997 through 1998. The attached materials detail this opposition to the awarding of the contract to Tidewater Towing.

6) **Errors in Form and Substance of the 1997 City Tow Contract:** The 1997 City Tow Contract, approved as to form and correctness by Deputy City Attorney Foreman, includes numerous provisions less favorable to the city of Norfolk than prior executed towing contracts. For instance, under the 1997 City Tow Contract the contractor may access all funds in the escrow account created by the sale of cars at auction. Previously, under the 1992 contract, the contractor could access only up to 1/3 of the funds available in the escrow account. Additionally, under

the 1997 City Tow Contract the annual lease payment for the use of the city owned Goff Street storage lot was $1,500 for years one and two of the contract. Previously, under the 1992 contract, the monthly lease payment was $1,050. These issues and others with respect to the text and effect of the 1997 City Tow Contract were repeatedly raised by the Norfolk Police Department to city officials to no avail prior to the signing of the contract.

EVIDENCE

The evidence produced by the Norfolk Police Department investigation includes witness testimony to the acts described, documentary evidence of the acts, city contracts and correspondence that circumstantially corroborate the witnesses as well as the investigative notes of members of the Norfolk Police Department. The evidence referenced in this memorandum where possible has been attached as indicated. This letter further serves as an introduction to the Norfolk Police Department's "Summary of Investigation of Tidewater Towing and Andre Foreman" attached in full. (TAB A) An additional event time line detailing the interaction between Tidewater Towing and Andre Foreman from 1992 onward is also included. (TAB B)

WITNESS INFORMATION

1) BARRY RUDIGER

Rudiger was the General Manager of Tidewater Towing from approximately 1992 through his departure in the spring of 1997. Rudiger was a participant in the majority of the meetings [both at Tidewater Towing and at other locations such as the Town Point Club] between Foreman and Summs during that period referenced above. Rudiger describes the substance of the conversations with Foreman

to include Tidewater Towing suggesting changes to city codes or regulations that would benefit Tidewater Towing as well as discussions between Foreman and Tidewater Towing indicating how Tidewater Towing could position itself to receive City of Norfolk Towing Contracts. These ongoing discussions included how Tidewater Towing could profit from said contracts. Rudiger further stated that Foreman routinely provided ad hoc legal advice to Tidewater Towing to include guidance on the drafting of correspondence to the city and to whom such correspondence should be directed. Rudiger also had personal knowledge regarding Foreman's receipt of auto service from Tidewater Towing; Foreman's receipt of other gifts from Tidewater Towing; and Foreman's role in advising Tidewater Towing.

On January 4, 1999 in Norfolk Circuit Court Rudiger plead guilty to three counts of misdemeanor embezzlement related to the Atlantic Auto Auction and the auctioning of cars donated to the American Cancer Society. Rudiger was sentenced to thirty-six (36) months in the Norfolk City Jail the execution of which was suspended on several conditions including restitution and Rudiger's "complete cooperation, to include truthful testimony if called as a witness, in any law enforcement investigation and/or criminal prosecution arising out of or related to the current investigation into any and all activities related to Tidewater Towing, its officers, or related concerns." The Investigator's Notes of SGT Johnson and Investigator Dayton and a synopsis of Rudiger's statement in the Office of the Commonwealth's Attorney on October 5, 1998 are attached. (TAB C)

Barry Rudiger was further interviewed in the Office of the Commonwealth's Attorney of October 28, 1999 and then again on November 1, 1999. The substance of his comments is as follows:

Barry Rudiger and his wife, Melba, came to Tidewater Towing with prior experience in the towing field. Rudiger indicated that Billy Summs hired both Rudiger and his wife as salaried employees with a significant amount of Barry Rudiger's compensation being paid to his wife as Rudiger had an IRS lien on his compensation. By 1997 Rudiger stated that he and his wife were paid $70,000 jointly by Tidewater Towing. However, due to Summs' failure to deliver on promises of bonuses and revenue sharing within Tidewater Towing, Rudiger indicated he and his wife had given Summs their letters of resignation with 90 days notice in the spring of 1997. Thereafter, Summs fired Rudiger theoretically due to questions concerning expenditures for carpeting [which turned out to be carpeting for Summs' own motor home]. Summs communicated Rudiger's discharge by voicemail. Melba Rudiger worked for the balance of the 90-day period.

Rudiger had known Deputy City Attorney Andre Foreman through Rudiger's prior experience with another towing company Rudiger owned., Rudiger stated that Foreman in Rudiger's past dealings with him had been 100% business. However, Foreman's relationship with Billy Summs was much different, according to Rudiger. During the period from the spring of 1994 through the end of 1996 Rudiger was aware that Summs frequently gave Foreman tickets to golf tournaments such as the Bruce Smith Charity Golf Tournament or celebrity events such as the Tim Reid Event for Norfolk State University. Many of these tickets Summs would receive for conducting the charity auctions at each event. Specifically, Rudiger recalled delivering the tickets for several years to Foreman for the Tim Reid Event. He also specifically recalled picking up tickets for the Bruce Smith Celebrity Golf Tournament and giving them to Summs who then gave them to Foreman.

Rudiger also observed Deputy City Attorrney Foreman having his black Mercedes detailed or undergoing minor repairs at Tidewater Towing's facility. Rudiger stated that to his knowledge Foreman never paid for the detailing work. Foreman would pay only for parts [such as tires] at the dealer cost, not any labor. While his car was being repaired or detailed, Foreman would drive one of the auction cars with dealer tags at no cost. Rudiger recalls personally picking up Foreman's car at least 10-12 times and dropping off the dealer car. Usually, Foreman later would return to Tidewater Towing's lot and pick up his car dropping off the dealer car. (See TAB E for documentation of repairs)

During the period from 1995 to 1997 Billy Summs went to Cuba several times. Each time Summs would return with a large amount of Cuban cigars in his briefcase, according to Rudiger. (See TAB C) Each year Summs would give a box of cigars to Foreman in Summ's office at Tidewater Towing. Rudiger recalls personally delivering a box of cigars to Foreman one year and Foreman telling Rudiger, "Tell Billy thanks a lot" with no offer to pay being made by Foreman. Rudiger said that it was his understanding that Foreman entertained the idea of becoming a judge in Norfolk. To that end, Rudiger said that Summs made several calls to politicians toward that goal. Rudiger said Summs indicated he wanted to maintain a favorable position with Foreman.

Rudiger described Foreman and Summs as very good friends. With respect to the awarding of the 1997 City Tow Contract Rudiger commented that they [Foreman and Summs] had convinced each other that Tidewater Towing was the only contractor that could handle the contract. Summs convinced Foreman of the importance of computerization for any company receiving a city tow contract.

Foreman, Summs and Rudiger met in excess of 25 times according to Rudiger at the Town Point Club usually for breakfast starting after the bid the Nuisance Abatement Contract. Summs and Rudiger each had a membership through Tidewater Towing. (See TAB K) It was at these meetings where Summs, Rudiger and Foreman would often discuss Tidewater Towing's situation with respect to city tow contracts. Additionally, Foreman would often provide Summs and Rudiger with legal advice, according to Rudiger. At one point Rudiger commented that he questioned Foreman about the nature of the relationship with Tidewater Towing. Foreman responded, "I have nothing to hide. I'm doing everything legal."

The closeness of this relationship was evidenced by a couple of situations. Shortly after Rudiger's arrival, Tidewater Towing bid for and received the Nuisance Abatement Contract on December 14, 1993. Unfortunately the bid terms were not favorable. Rudiger stated he watched Summs call Foreman and leave a message stating that "here's what we bid", "I need you to get back" and could we make this contract a sole solicitation? Rudiger said that later Summs said to Foreman, "I can't make money at $30 [a tow] and $3 [a day storage fee]." Foreman responded by agreeing to convert the contract into a "trial thing" to see how it worked which enabled the city (through Foreman) to change the contract terms. Thereafter, Tidewater Towing completed the initial "trial period" and received two extensions, according to Rudiger. Rudiger recalls he and Summs meeting Foreman in Foreman's office approximately three to five times.

In the fall of 1996, when Pete Penello of Pete's Towing gave notice to terminate his contract due to the terms, Foreman directly conference-called Tidewater Towing to have them "step in and take over contract." Foreman described that "Pete [was] back on the warpath."

After the awarding of the 1997 City Tow Contract, Rudiger negotiated with Pete Penello to purchase the trailer, phone and other improvements that Penello had made to the Goff Street Lot. Eventually, they agreed on $12,000 for Tidewater Towing to pay to Penello.

With respect to the 1997 City Tow Contract, Rudiger reported that Summs was concerned when he learned that Dale Old Wrecker Service, Inc. had also bid the contract since Dale Old had the capacity to fulfill the contractual requirements. (TAB O) "Don't worry about it," Foreman told Summs, according to Rudiger. Foreman told them that he was "going to take it [the contract] out of the hands of the purchasing department." [See Statement of James Waller at page 14] Rudiger said the 1997 City Tow Contract was to be the first time price was not the prime issue in the bids. At one of their breakfast meetings during the period of late 1996 or early 1997, Rudiger recalls Foreman stating that "You [Tidewater Towing] will be the only responsible bidder." Further, Foreman had told them that "Pete [Pete's Towing] will not win [the] contract."

Rudiger said that he personally did not believe prior to the awarding of the 1997 City Tow Contract that Foreman had as much control as he [Foreman] expressed. Foreman told Tidewater Towing that "You'll get the contract" shortly after the proposals were submitted. In fact, Rudiger said he called Jim Waller, the purchasing agent, four to five times to ensure Tidewater Towing had included all the necessary materials for their proposal. Waller said, it was "in the hands of the city attorney's office." When the Norfolk Police Department raised concerns about Tidewater Towing, Rudiger said Foreman directly advised Summs and Tidewater Towing as to how to answer the concerns in writing. (See Tidewater Towing Letter of February 26, 1997 included at TAB P)

During the period from 1993 through the spring of 1997 when Tidewater Towing received the 1997 City Towing Contract Rudiger reported that the earnings and the profit margin for Tidewater Towing increased significantly due to the city tow contracts. These factors put Tidewater Towing in a solid financial position that made the company an attractive target for corporate acquisition.

Rudiger gave three formal signed statements to the Norfolk Police Department, included in this report at TABs C1, C2, and C3.

2) ANGELO J. "PETE" PENELLO:

Pete Penello is the owner of Pete's Wrecker Service. Penello gave a statement to the Norfolk Police Department in which he described a history of preferential treatment with respect to city contracts going back to 1994 that benefited Tidewater Towing over its competitors. For example, in 1994 the city set out the Nuisance Abatement Contract with a tow price of $30 and $3 per day storage, a rate at which Penello states that no towing company could show a profit. Tidewater Towing was the only company to respond and received the contract. Forty-five days later the contract rate for tows increased to $45 a tow as well as $5 a day storage fees. Penello complained to Foreman asking how the fee was suddenly raised after Tidewater Towing got the contract and why didn't he or others get the chance to bid at that rate. Foreman responded that "I'm not changing the contract like that. I'm making a pilot program out of this." Penello gave a formal signed statement to the Norfolk Police Department, included in this report at TAB J.

The following is a summary of an additional statement given by Pete Penello in the Office of the Commonwealth's Attorney on September 30, 1999:

Penello is the owner of Pete's Towing. He stated that he had been involved with city towing contracts in Norfolk for eight to ten years prior to the awarding of the 1997 City Tow Contract. Penello had held the contracts for the towing of nuisance and abandoned cars as well as police initiated tows while Tidewater Towing had held the contract for Norfolk Redevelopment and Housing Authority tows. Penello stated that with respect to towing contracts in Norfolk "Andre Foreman always [had] been the guy with the reins with city contracts." Penello had been a member of the Towing Advisory Board and stated that he attended every board meeting of which he received notice. However, Penello does not recall ever having a Towing Advisory Board discussion that supported combining all the towing contracts into a single contract.

Penello indicated he felt there was some impropriety in Tidewater Towing's receipt of the Nuisance Abatement Towing Contract in 1994 as it was bid at $30 a tow and $3 a day storage. Due to these low bid terms [levels at which Penello indicated no towing company could make any profit] only Tidewater Towing submitted a bid. Penello recalled approximately 40-50 days later Deputy City Attorney Andre Foreman announced a "pilot program" that caused the fees to be raised to $45 a tow and $5 a day storage. Penello felt that all towing contractors should have been given the opportunity to bid for the contract at those higher rates.

Penello recalled that he paid approximately $1,050 a month rent for the Goff Street Lot under the 1992 Police Tow Contract. (TAB T) The 1997 City Tow Contract awarded to Tidewater Towing contained a significantly lower lease term. (TAB R) Additionally, under the 1992 Police Tow Contract that Penello held until the creation of the single contract in 1997, Penello received $30 a tow and $2 a day storage. Penello recalled talking to Foreman to actually

speed up car sales as he was losing money under the contract. Foreman refused to take any action [although Penello knew he had done so previously for Tidewater Towing] and said, "Any changes in [the] contract have to be approved by the Towing Advisory Board." Since Penello felt that Foreman would not even consider his situation, Penello determined he had no choice but to send the city of Norfolk a letter in the fall of 1996 in which he asked to terminate the existing contract. (TAB L)

Under the contract terms of the 1992 Police Tow Contract the city of Norfolk received 2/3 of the balance of funds in escrow after payment of all costs and Pete's Towing could apply for fees against the remaining 1/3 at the end of every 90 days. Penello noted that this restriction was completely eliminated with the 1997 City Tow Contract and Tidewater Towing had access to the entire escrow amount. (TAB S)

Penello submitted his proposal on behalf of Pete's Towing for the 1997 City Tow Contract. In the past, Penello indicated James Waller from the city purchasing office would generally be there. Either Waller or another man in January 1997 said the proposals would be reviewed and you will be called in for inquiry. Penello said he never was called or notified in any way by the city of Norfolk with respect to the 1997 City Tow Contract. In fact, the first indication he had that Pete's Towing had lost the contract was when Barry Rudiger called Penello and asked when Pete's Towing could be out of the lot. Penello said that he was never told that the ownership of a large wrecker was a consideration in the awarding of the 1997 City Tow Contract. During the period that Penello had held a city contract, he never had an incident where he could not promptly tow any vehicle either using his own vehicles or subcontracting the tow. Penello indicated that there were few tows in Norfolk that would require the large wrecker.

Penello eventually decided to sell some of the physical improvements he had added to the lot [such as the trailer] to Tidewater Towing so that he could move out of the lot as quickly as Tidewater Towing was trying to move in. Foreman acted as an intermediary in the discussions over this transfer. Penello commented that some of the "problems" Tidewater Towing encountered upon assumption of the 1997 City Tow Contract [such as receiving Department of Motor Vehicle transcripts] had not been a problem at all for Pete's Towing.

3) LT JOEL HOWARD:

LT Joel Howard was interviewed in the Office of the Commonwealth's Attorney on July 26, 1999. LT Howard replaced LT Creekmore in the Special Enforcement Division of the Norfolk Police Department in early 1997. LT Howard had prior exposure to towing matters and became aware that Pete's Towing had wanted the authorized tow fees increased and had sent in a letter of termination that prompted the need for a new contract.

In late January 1997 Assistant Chief Darden contacted LT Howard and several other officers in the Special Enforcement Division and tasked them with the evaluation of the three bids for the new 1997 City Tow Contract. LT Howard recalled reviewing the fact sheets of the bidders. With respect to the annual lease payment for the Goff Street Lot, Tidewater Towing was only offering $1500 a year, a figure that attracted their attention. Lt Howard and the other members of the Special Enforcement Division summarized their conclusions in the February 7, 1997 letter that recommended against awarding the contract to any single bidder. Lt Howard indicated it was clear that Tidewater Towing was the only bidder with the capacity to perform the contract but had a long record of questionable towing practices and problems with the Norfolk Police

Department. Pete's Towing was clearly more "user friendly" but did not have sufficient capacity to perform the contract. (TAB P)

Shortly after the issuance of the February 7, 1997 letter, LT Howard recalls being present at a meeting on the 10th floor in City Hall in Norfolk. LT Howard recalls Assistant Chief Hierstein, Assistant Chief Jackson, Assistant Chief Darden, and LT Howard being present when Deputy City Manager Sterling Cheatham said [with respect to the three bids for the 1997 City tow Contract] that he understood that "we do not want to accept any of these bids" and that we want to "put it back out to bid." LT Howard recalled Chief High then saying , "No, we're going to go with Tidewater Towing" which prompted a strong response by Assistant Chief Darden who had signed the February 7, 1997 letter opposing Tidewater Towing's receipt of the contract. LT Howard vividly remembered Deputy City Attorney Foreman in an animated tone challenging the opposition to Tidewater Towing verbalized by Assistant Chief Darden. Foreman asked what Tidewater Towing had done and said to "tell them [Tidewater Towing], bring them in," LT Howard described Foreman as advocating on behalf of Tidewater Towing.

As a result of the City Hall meeting LT Howard recalls being present at a follow-up meeting involving Assistant Chief Darden, Assistant Chief Jackson, Assistant Chief Hierstein, Billy Summe of Tidewater Towing, and Barry Rudiger of Tidewater Towing. No other bidders were invited to this meeting. LT Howard believes this meeting came about as a result of Foreman's comments at the meeting at City Hall. At this meeting, the police officials talked through a checklist of issues concerning towing practices by Tidewater Towing. Tidewater Towing promised to do a better job in the noted areas. (TAB P)

LT Howard did not recall any other involvement in 1997 City Tow Contract process until he was asked to review a draft contract. LT Howard stated that the Special Enforcement Division [as documented by a letter from CPT Young] once again indicated the contract as drafted was not correct. (TAB Q) LT Howard believed Chief High was not going to sign the contract in its present form.

Once the 1997 City Tow Contract was awarded to Tidewater Towing LT Howard stated that problems began to arise very quickly. The Special Enforcement Division and LT Howard documented numerous concerns brought to his attention by Johnnie Speight. These problem areas included insufficient appraisers for vehicles, proper notification to registered owners as required by the Department of Motor Vehicles, and storage fees raised in numerous letters during the summer and fall of 1997. (TAB U) According to LT Howard the Norfolk Police Department had to assume responsibility not only for monitoring compliance with the 1997 City Tow Contract, but to also perform several contract requirements that Tidewater Towing failed to perform.

These documents confirm that on July 17, 1997 LT Howard and Johnnie Speight notified William Summs [then running the daily operations of Tidewater Towing in the wake of Rudiger's departure in the spring of 1997] of the requirement for three appraisers contained in Norfolk City Code Section 25-596 and the 1997 City Tow Contract. Summs claimed ignorance regarding the contract requirement, but indicated he would ask Deputy City Attorney Foreman about the requirement.

Foreman and Summs were observed on July 29, 1997 at approximately 9:30 p.m. entering Summs' office at 975 Goff Street, Norfolk, Virginia by Mitchell Landrum, an employee of Tidewater Towing. The next day, July 30, 1997, LT Howard asked Summs for the names of his three

appraisers. Summs stated he had just heard of this requirement and deferred the issue to Foreman. Summs claimed the requirement would be a waste of money as the auction itself would determine the cost of the vehicle. LT Howard also notified Summs that Tidewater Towing was still violating Norfolk City Code Section 25-595 requiring that registered vehicle owners or lien holders be notified within fifteen (15) days of the tow by certified mail.

On August 13, 1997 Deputy City Attorney Foreman notified LT Howard that the requirement for three appraisers was not necessary as the auction would determine the value of a vehicle. When LT Howard said that the Norfolk City Code required three appraisers, Foreman responded that he wrote that code section and the he [Foreman] was holding the three-appraiser requirement in abeyance with respect to Tidewater Towing. LT Howard documented his observations of violations by Tidewater Towing of the 1997 City Tow Contract in a letter to the Chief of Police dated August 25, 1997. (TAB U)

Later, on March 20, 1998, Lt. Howard noted that Tidewater Towing was moving vehicles from Liberty Street (impound lot) to Tidewater Towing at Lance Road, contrary to contract terms. Lt. Howard stated that Tom Rule [by then the General Manager at Tidewater Towing] said Foreman told Tidewater Towing they could move them.

4) JAMES WALLER [Purchasing Agent for City of Norfolk]:

James Waller was interviewed on August 26, 1999 in the Office of the Commonwealth's Attorney concerning 1997 City of Norfolk Towing Contract. Waller noted that the contracting process chosen by the City of Norfolk for the 1997 City Tow Contract was the "Competitive Sealed Proposal" process in which the City of Norfolk solicited

"Requests for Proposals" from interested vendors. The Competitive Sealed Proposal contracting process [as opposed to the more commonly utilized "Competitive Sealed Bid" in which the city would have solicited "Invitations for Bids"] allowed the city to select the proposal deemed to be "most advantageous" to the city taking into account selection criteria.

Waller stated a "Competitive Sealed Bidding" process would result in the awarding of a contract based strictly on low bid assuming capability to fulfill contract requirements. On the other hand, the "Competitive Sealed Proposals" process would result in the awarding of the contract to the lowest "responsible" and "responsive" bidder [bidder experience and financial capacity to perform contract and fulfills the criteria deemed by the city]. The "Competitive Sealed Proposals" contracting process implicitly allows greater subjective evaluation.

According to Waller, the City Manager's office may decide to utilize the "Competitive Sealed Proposals" method of contracting when sealed bidding is not practicable or physically advantageous. The implementing mechanism of "Requests for Proposals" lends itself to situations where the city is contracting for something that does not lend itself directly to fixed specifications. A letter from Assistant City Manager Sterling Cheatham dated January 8, 1997 authorized the use of the "Competitive Sealed Proposals" method of contracting to select a towing contractor for the City of Norfolk. (TAB N) The letter also stated that the Chief of Police would appoint a selection committee to evaluate the proposals submitted and make recommendations to the City Manager.

Waller indicated that Andre Foreman, Deputy City Attorney for the City of Norfolk, developed the language of the Requests for Proposals for the City Tow Contract and

then sent it to Waller for comment. Thereafter, on December 10, 1996 Foreman forwarded a draft of the request for proposals to Waller for review. Waller recalled that in a preliminary meeting attended by Sterling Cheatham, Assistant City Manager, and Andre Foreman that the goal of combining towing services for the City of Norfolk into one contract was discussed. Waller noted the fact that a copy of the proposed contract was attached to the Request for Proposals was somewhat unusual. (TAB N)

Once the vendors submitted their proposals, Waller recalled reiterating that the City should only utilize the factors discussed in the Request for Proposals as evaluation criteria. Should a modification in criteria be desired, notice of the same should be given to all vendors so as they each have an equal opportunity to resubmit. Once the evaluation process is complete, Waller, as the Purchasing Agent for the City of Norfolk, would send out letter to the Office of the City Attorney to prepare the contract. Waller would also send out letters to individual vendors who submitted proposals.

With respect to the 1997 City Tow Contract Waller said he was not named a member of the evaluation committee to review the proposals. However, Waller did indicate that he discussed the evaluation process with Foreman and stressed that the factors in the Request for Proposals must be the basis for the selection. Waller noted that during the period immediately after the print media had written several articles concerning the lease terms included in the 1997 City Towing Contract the Purchasing Agent's file for the 1997 City Tow Contract was physically forwarded to the City Attorney's Office for several weeks. Thereafter, Waller stated he believed several of his standard file documents were missing.

Waller indicated that he talked with Foreman on or about August 26, 1999 about the 1997 City Tow Contract after it had received attention from the media. Foreman told Waller that the "Price Rate Sheet" was the document used in the contract preparation and that on the prior page Tidewater Towing had only "suggested" the rate of $1,500 a month. Foreman also stated that the Norfolk Police Department had the obligation to administer the contract; that the Norfolk Police Department evaluated the contract and approved it. Foreman indicated that the lease rate was not inconsistent as the price sheet was specific. With respect to Waller's upcoming discussion of the contracting process with the Commonwealth's Attorney, Foreman stated words to the effect of "Tell 'em exactly the truth and then tell him to get (expletive deleted)."

5) ASSISTANT CHIEF OF POLICE SHELTON DARDEN:

ACOP Shelton Darden was interviewed in the Office of the Commonwealth's Attorney on August 30, 1999. Darden recalled that prior to the awarding of the 1997 City Tow Contract there had been discussion of the desire to pull all the contracts for towing services in Norfolk together into one towing contract.

Darden sat as a representative of the Norfolk Police Council to meet and review issues relating to towing service in Norfolk, Virginia. One such issue was the settling of towing fees chargeable by tow companies in Norfolk. Billy Summs, owner of Tidewater Towing, sat as a member of the Towing Advisory Board and strongly advocated for the increase of towing fees. (TAB M) During meetings of the Towing Advisory Board in 1998 Darden stated that Pete Penello of Pete's Towing strongly opposed this idea as he indicated that such a proposal was a guarantee that Tidewater Towing would receive any prospective contract. In carrying out these duties, Darden would receive written

guidance concerning towing matters from Deputy City Attorney Andre Foreman.

Once the proposals had been received by the City of Norfolk for the 1997 City Tow Contract, Darden recalled being asked to have members of his command in the Norfolk Police Department [with experience in dealing with the tow companies] review the proposals and comment on them. Darden's group detailed their conclusions in a letter dated February 7, 1997. (TAB P) The letter strongly recommended against awarding the 1997 City Tow Contract to Tidewater Towing. Darden recalled that he felt Tidewater Towing's proposal was "very deceptive". As an example, Darden stated his group noted the difference in lease terms for the rent on the Goff Street Lot as to where the cited figure was per month or per year. The Norfolk Police Department further for many years had received reports of improper towing practices by Tidewater Towing. Darden personally felt that representatives of Tidewater Towing [Billy Summs] had deceptively estimated the percentage of "dolly usage" in towing vehicles when Tidewater Towing presented such figures to the Towing Advisory Board. [Darden stated that other towing operatives including Pete Penello stated it was a "very small percentage" of tows that utilized dollys.]

After the submission of his letter opposing the awarding of the 1997 City Tow Contract to Tidewater Towing, Darden recalled attending a meeting in City Hall. At this meeting Darden described the historical problems the Norfolk Police Department had with Tidewater Towing. These problems included complaints from citizens and concerns about Tidewater Towing's business practices. At this meeting Darden said that Deputy City Attorney Andre Foreman strongly argued on behalf of Tidewater Towing and their capabilities to perform the contract.

Thereafter, Darden was instructed to bring the concerns he had directly to Tidewater Towing's attention to allow them to respond. Darden stated that he was not comfortable with the idea of talking with only one vendor. Darden recalled that he had follow-up meetings with Chief of Police High and believed that the Chief of Police shared Darden's opposition to Tidewater Towing.

Darden met with representatives of Tidewater Towing [Billy Summs and Barry Rudiger] at Police Headquarters on or about February 26, 1997. Darden and representatives of the Norfolk Police Department discussed point by point concerns that had been raised concerning Tidewater Towing. Foreman was also involved in this meeting. These issues were reduced to a checklist that Tidewater Towing's representatives signed. Darden's letter of February 27, 1997 documents this meeting. (TAB P) After the meeting on February 27, 1997, Darden did not recall any further dealings with the 1997 City Tow Contract process.

Darden stated that Foreman consistently supported Tidewater towing's receipt of the 1997 City Tow Contract saying "...they are the ones that have the ability [to do it]." During the investigation of the 1997 City Tow Contract Darden stated that Foreman approached Dardan and asked "can we talk about the investigation." Foreman also expressed concern to Darden that someone was over at the Town Point Club asking for information.

During the period after the awarding of the 1997 City Tow Contract Darden indicated that many of the documented problems Tidewater Towing encountered in performing the contract were presented to the Towing Advisory Board.

6) ASSISTANT CHIEF OF POLICE JACKSON:

ACOP Jackson was interviewed on July 28, 1999 in the Office of the Commonwealth's Attorney. Assistant Chief Jackson remembers being present at the City Hall meeting when Assistant Chief Darden strongly recommended against one towing company [Tidewater Towing] receiving the contract. Assistant Chief Jackson was familiar with Tidewater Towing's problems with improper towing practices in the past. Assistant Chief Jackson recalled Chief High, Assistant Chief Darden, LT Howard, Deputy City Attorney Foreman, Deputy City Manager Sterling Cheatham and possibly several other individuals being present at the meeting.

Assistant Chief Jackson recalls Deputy City Manager Sterling Cheatham opening the meeting and shortly thereafter Assistant Chief Darden outlining on behalf of the Norfolk Police Department his opposition to Tidewater Towing receiving the 1997 City Tow Contract. Deputy City Attorney Foreman questioned Darden about his opposition indicating that "we'll write this stuff into the contract." Assistant Chief Jackson perceived that Deputy City Attorney Foreman was on Tidewater Towing's "side". In fact, Assistant Chief Jackson stated that the joke was that "Andre [Foreman] was Tidewater Towing's lawyer." As a result of the City Hall meeting, Assistant Chief Jackson stated that he then participated in a follow-up meeting with the representatives of Tidewater Towing that took place in the Chief of Police's conference room. Jackson commented that it seemed as if it was decided that Tidewater Towing would get the contract and the meeting to go over specific concerns was an attempt to appease the Norfolk Police Department.

Sometime thereafter Assistant Chief Jackson specifically recalled talking with Chief High in Jackson's

office concerning the lease term for the compound rental in the 1997 Tow Contract. They thought the cited figure had to be a mistake. Chief High picked up Assistant Chief Jackson's phone and called Deputy City Attorney Foreman. Assistant Chief Jackson stated that he heard Chief High say during an animated conversation, "You're just my lawyer" and then later "I'm not going to sign the contract." Chief High commented on the lease terms in the contract as drafted indicating that we [the city] thought we were getting more. It was Assistant Chief Jackson's understanding that Foreman was drafting the contract.

Assistant Chief Jackson did not hear anything else for about ten days before hearing that Tidewater Towing had been awarded the 1997 City Tow Contract. Assistant Chief Jackson commented that at the time he thought this was strange given the preceding events. No other city contract had the same level of city attorney advocacy on behalf of the job contractor as did the 1997 City Tow Contract involving Deputy City Attorney Foreman and Tidewater Towing, according to Assistant Chief Jackson. Further, Assistant Chief Jackson stated that Foreman routinely would go over the chain of command in the Norfolk Police Department and call Chief of Police High directly on towing issues.

7) CHIEF OF POLICE MELVIN HIGH:

Chief of Police Melvin High was interviewed in the Office of the Commonwealth's Attorney. Chief High recalled that with respect to the 1997 City Tow Contract he had received in late 1996 recommendations from the Towing Advisory Board. Chief High further recalled concurring with the concerns outlined by Assistant Chief Darden in his memorandum dated February 7, 1997 with respect to the prospect of Tidewater Towing receiving the contract. These concerns included the specifics of the

contract proposal as well as issues concerning Tidewater Towing's business practices. (TAB P)

Subsequently, Chief High recalled that a request was received for the Norfolk Police Department to sit down with the bidder, Tidewater Towing, to discuss specific concerns. Chief High could not recall the exact mechanism by which this request was conveyed to the Norfolk Police Department. It was conceded that Tidewater Towing had the requisite content [size and equipment] to perform the contract by the NPD officials reviewing the bid. However, Chief High recalled the Special Enforcement Division of the Norfolk Police Department [LT Howard] communicating opposition due to Tidewater Towing's history. Chief High further recalls being informed by either the City Attorney's Office or the City Manager's Office that "legal reasons" would be needed to reject. Chief High recalls indicating to Foreman that should the concerns raised be resolved, he'd sign the contract.

In other situations should the Norfolk Police Department identify an issue for which a contract would be needed, the department would forward the requirement to the legal office and Jim Waller would write it up, according to Chief High. In the area of towing matters for the City of Norfolk, Chief High stated that clearly the principal mouthpiece for the City of Norfolk was Deputy City Attorney Andre Foreman. With respect to the process involved with the awarding of the 1997 City Tow Contract Chief High said that since several contracts were being performed on an interim basis, there was clearly a feeling with the City government that "we have to get it done." Chief High stated that he would not have signed the 1997 City Tow Contract unless signed by the Norfolk City Attorney. Chief High said he trusted the City Attorney to prepare the proper contractual terms.

After the 1997 City Tow Contract was awarded to Tidewater Towing, Chief High recalled receiving reports Deputy City Attorney Foreman had chastised LT Howard over what Foreman believed was the fact the Norfolk Police Department had "it in" for Tidewater Towing and were "nit-picking" in their concerns over the execution of the contract. However, one acknowledged goal of the City in the merger of the multiple city towing contracts with the 1997 City Tow Contract was the reduction of tasks upon the Norfolk Police Department. Chief High recalls receiving reports indicating just the opposite had occurred with Tidewater Towing. "I would want to opt out of the relationship with [Tidewater Towing]", Chief High said recognizing the problems that occurred after the 1997 City Tow Contract.

During the time period immediately before and after the awarding of the 1997 City Tow Contract to Tidewater Towing, Deputy City Attorney Foreman never expressed any direct relationship with the vendor [Tidewater Towing]. Had Foreman done so, Chief High indicated he would have asked for another city attorney.

8) DEPUTY CITY MANAGER STERLING CHEATHAM:

Deputy City Manager Sterling Cheatham was interviewed briefly in his office on July 30, 1999. Cheatham indicated that prior to the 1997 City Tow Contract three different city tow contracts existed with two contracts expired or about to expire as calendar year 1996 ended. Cheatham recalled that the city wanted to be more aggressive in the towing of abandoned cars. Overall, the intention was to consolidate the multiple towing contracts into one through the issuance of a single Request For Proposals (RFP). The result would hopefully take the city out of much of towing business, Cheatham said. With the

expiration of some of the existing contracts, completing the contracting process quickly was important to ensure continuous service, according to Cheatham.

Cheatham stated that he did not recall one discussion over the lot lease terms in the 1997 City Tow contract. After the Request For Proposals went out, Cheatham did not recall any discussion that the lease fee in Tidewater Towing's submission was lower than other bidders or the prior lease terms. In fact, Cheatham stated the first time he became aware of the reduced lease fee when a reporter asked him about it [in 1999]. Cheatham did indicate that he talked about the contract with Deputy City Attorney Foreman.

9) JOHNNIE SPEIGHT, NORFOLK POLICE DEPARTMENT:

Johnnie Speight was interviewed in the Office of the Commonwealth's Attorney. Speight indicated he had worked in the Goff Street Lot for many years prior to his retirement and since then returned to work at the lot. Speight indicated that over his years of service Pete's Towing, when they handled city tow contracts, rarely had complaints filed against them. Pete's Towing further worked very smoothly with the Norfolk Police Department and Speight never considered there to have been any problem with improper towing practices or the integrity of their processing of towed vehicles.

On the other hand, Speight stated that he had encountered problems with Tidewater Towing. Speight had concerns regarding Tidewater Towing's storage of towed cars. Speight believed that employees of Tidewater Towing removed expensive interior equipment [such as stereos] from the cars prior to auction. Speight further believed that personnel from Tidewater Towing tried to increase the time

that cars were on the lot and thereby increase the storage fees Tidewater Towing could receive. In the past the Norfolk Police Department ran the Goff Street Lot. Once Tidewater Towing received the contract, the goal was to alleviate the burden upon the police. Instead, according to Speight, the burden became greater as the Norfolk Police Department had to ensure Tidewater Towing followed proper procedures.

For example, prior to the awarding of the 1997 City Tow Contract, Speight had been responsible for ensuring that the registered owners of the towed vehicles received proper notice. Once that notification had been sent, receipt of the notification received back, and the required time period passed, the vehicles could be processed for auction. After Tidewater Towing assumed this responsibility in 1997, Speight indicated that notification to the registered owners slowed down and cars sat on the lot for lengthy periods. Speight started to make copies of the DMV transcripts received on towed vehicles so that he could confirm the fact that Tidewater Towing had received the sufficient information to process the vehicle. Tidewater Towing previously had explained the failure to process such cars on not receiving or lost the DMV transcripts. Speight brought these problems to the attention of LT Howard who in turn would contact Tidewater Towing to complain about the practices.

Representatives of Tidewater Towing, to include Billy Summs and Tom Rule [who had replaced Barry Rudiger in the spring of 1997], would come by the lot and complain to Speight that LT Howard was "out to get them." Summs told Speight to "come to him" with concerns rather than reporting them to LT Howard. Speight also reported that Deputy City Attorney Andre Foreman had called him four to five times after Tidewater towing received the 1997 City Tow Contract. Foreman questioned Speight as to why

LT Howard was making such a "big deal" out of these issues. Foreman said that he [Foreman] was "getting sick of these stupid little accusations", according to Speight. Speight stated that he felt that Foreman wanted Speight to bring any observed problems to Foreman's attention, rather than bring them to LT Howard's attention. In these communications, Speight felt that Foreman tried to use the fact that both Foreman and Speight were black men as a factor.

Foreman told Speight that "[I've] known Billy Summs" and "[he] is an old friend", according to Speight. As for the problems with Tidewater Towing, Foreman told Speight that "if the city did not want them [Tidewater Towing] to have it [the contract], they wouldn't have given it to them." Speight indicated that he concluded that whatever conversations he had with Foreman were communicated to Summs and Tidewater Towing. For example, Speight recalled telling Foreman about a problem that he'd discussed with LT Howard. Later, Speight received a telephone call from Summs that started with "it has been brought to my attention that LT Howard says..."

During the summer of 1998, Speight recalled seeing Andre Foreman near the Credit Union in City Hall at which time Foreman started angrily discussing ongoing police inquiries and stated, "Billy [Summs] and I belong to the same club, so (expletive deleted) what?" In other conversations, Speight indicated that he felt Foreman tried to defend the awarding of the contract to Tidewater Towing by indicating "all Pete [Penello] did is bitch, bitch" and "the other one [Dale Olds Towing] is out of the city". With respect to the events of the fall of 1996 that preceded the contracting process, Foreman said at that time that "he [Pete Penello] signed the contract; he's got to take the bitter with the sweet. If Pete wants out of the contract, all he's got to do is write a letter", according to Speight.

Speight confirmed that awarding Tidewater Towing the 1997 City Tow Contract did not reduce the workload on the Norfolk Police Department. Instead, the Norfolk Police Department over time assumed many of the procedural requirements of the contract [such as securing the Department of Motor Vehicles transcripts for towed cars] and had to scrutinize the entire process to ensure that cars were processed. Speight routinely called Tidewater Towing on such problems as cutting the grass at the Goff Street Lot, "losing" property from towed cars, responding slowly to tow calls, failing to promptly release towed vehicles to owners seeking their release, and failing to adhere to proper procedures at the car auctions. Speight additionally would regularly bring these issues to the attention of LT Howard for assistance in resolving them.

Speight recalled one auction at which a bid was given for a city car and the representative of Tidewater Towing running the auction said to skip the car. Speight felt this action [which would result in the car sitting for a longer period and accumulating more storage fees] was improper and strongly brought it to Tidewater Towing's attention thereby starting a heated argument. The next day Foreman called Speight apparently having been told of the incident and tried to pacify Speight. "It seems Tom [Rule] was trying to do what Billy [Summs] wants him to do and Johnnie [Speight] is trying to do what LT Howard wants him to do," Foreman commented according to Speight. "Are we friends again?" Foreman asked of Speight.

Speight also reported that representatives of Tidewater Towing tried to ask him to "do lunch" with them in an attempt [in Speight's mind] to gain favor with him. Speight told Tidewater Towing he did not "do lunch." Speight indicated he felt that Billy Summs and Tom Rule [who had replaced Barry Rudiger at Tidewater Towing] tried to use Speight to gain information about inquiries into

towing concerns. "Have you heard anything about an investigation into Tidewater Towing holding cars?" Billy Summs asked Speight who noted he would refer Summs or Rule to LT Howard. Speight commented that he did not appreciate the continuing efforts by Tidewater Towing to "hit him up" for such information.

Speight also provided a formal written statement to the Norfolk Police Department. (TAB I) Speight states that after Tidewater Towing received the City Tow Contract in April 1997 he had problems getting rid of junk vehicles as required by state and city codes. Foreman had told him he [Speight] couldn't do it because the paperwork [required to be completed by Tidewater Towing] was not completed. Speight's statement read in conjunction with the information provided by Lt. Howard and others reveals that Tidewater Towing failed to adhere to any regulations or rules ensuring the efficient processing of vehicles through the compound to auction. The benefit to Tidewater Towing as a result of slow processing was Tidewater Towing's ability to "bill" [$10 a day] the city to recoup storage fees. Speight stated that every time he would try to force Tidewater Towing to efficiently process the vehicles impounded, Foreman would subsequently call him. This storage fee issue was belatedly addressed by a 1998 Amendment. (TAB V)

10) WILLIAM SUMMS:

William Summs is the past President and Owner of Tidewater Towing. Summs has never been questioned specifically regarding the issue of Tidewater Towing's relationship with Andre Foreman as it affected the process of the awarding of city tow contracts.

During the investigation into the original towing incident and tow fees, Summs was questioned several times

and his statements are attached that impact on the performance of automotive work at the Lance Road compound. Norfolk Police Department investigators perceived that Summs "distanced" himself from Rudiger and tried to place all blame for wrongdoing on Rudiger. Summs does, unwittingly, corroborate Landrum and Rudiger [with respect to the issue of automotive work performed for city officials] denying awareness of the work performed for Foreman. Included is an internal Tidewater Towing document reflecting Summs' usage of the Town Point Club as a business meeting place, thus corroborating Rudiger's assertions. A search of Tidewater Towing's computer records did not reveal any "readable" records concerning the Town Point Club; however, the records do indicate ongoing meetings. (TAB K)

In late 1998 or early 1999 Summs' interest in Tidewater Towing was purchased by a "Center Line" Corporation from Texas that now owns the entity known as Tidewater Towing. This investigation does not include information on the specific details of this transaction. Reportedly, Summs accepted a paid consultant position with Center Line that keeps Summs in a position to manage the day-to-day operations of the business operation known as Tidewater Towing.

11) MITCHELL LANDRUM:

Mitchell Landrum was a mechanic for Tidewater Towing who confirms the circumstances surrounding the repeated service work he [Landrum] personally performed on Foreman's car [Black Mercedes] in 1996 and 1997. The work included repairing an electric seat switch; transporting Foreman's car to have radio installed; replacing a gas peddle; and transporting Foreman's car to have tires installed. (TAB D) Landrum supplied the Norfolk Police

Department with the original vouchers reflecting this service. (TAB E)

12) JOHN WESLEY BRADY:

John Brady was a driver/supervisor for Tidewater Towing between 1994 and 1997. Brady observed in 1996 Foreman dropping off his [Foreman's] car to be detailed at 1195 Lance Road. Brady had observed Foreman at Tidewater Towing's office on other occasions for meetings as well as to go to lunch with Summs. Brady recalled during supervisor's meetings at Tidewater Towing that if problems arose [for example an incident with the police over the propriety of a tow], Rudiger would immediately call Foreman in the middle of the meeting to have problem resolved. Brady observed Foreman at Tidewater Towing several weeks after the Norfolk Police executed a search warrant on 5/7/97. (TAB F)

13) SHARON ROUT:

Sharon Rout was a former Sales Manager with Tidewater Towing who left employment with Tidewater Towing on 12/8/95. Rout recalls seeing Foreman bring car in for service work as a favor. Rout remembers Rudiger referring to Foreman as "their inside guy"; Rudiger saying that Foreman kept them "informed" as to towing issues before city council; and Rudiger saying after Tidewater Towing got the "Health Department Contract" [Note: Reference believed to be to the "Nuisance Abutment under 29-58cc, awarded 12/14/93] they were going to get the city contract [Tow Service Contract signed 4/15/97] and Andre Foreman was going to help them." (TAB G)

14) INVESTIGATOR JOHN MYERS, NORFOLK POLICE DEPARTMENT:

Investigator John Myers was working off-duty on May 13, 1997 as security at Atlantic Auto Auction at the 1195 Lance Road location and observed Foreman arrive at 5:00 p.m. and enter William Summs' office. At 6:20 p.m. Summs and Foreman left the building. This meeting occurred six days after Investigator Dayton of the Auto Squad of the Norfolk Police Department executed a search warrant at the same location [1195 Lance Road] concerning towing fees [dealing with the original investigation of the 2/20/97 incident]. (See TAB A)

15) DAVID THACKER, NORFOLK POLICE DEPARTMENT:

David Thacker served as an Operations Officer for Chief of Police. Thacker would testify that Foreman called on June 23, 1997 [after Tidewater Towing's receipt of the 1997 City Tow Contract] asking for a criminal history on someone who was going to apply for a position at Tidewater Towing. Foreman knew the individual had a prior drug conviction and wanted to talk to the Chief [of Police] to have the guy hired. The person's name was Dewitt Rule who subsequently was hired. Foreman called Thacker back on July 8, 1997 to get a copy of Rule's criminal history. Thacker arranged to have this done at Central Records and told Foreman someone would have to sign for it pursuant to regulations. Thacker said Foreman directed him to run the record and give it to the Chief of Police so he [Foreman] could discuss it with the Chief later. Thacker gave the record to the Chief of Police on July 9, 1997 and informed the Chief of what had occurred. (TAB H)

DOCUMENTARY EVIDENCE/CITY CONTRACTS AND CORRESPONDENCE

1) **Tidewater Towing Records of Automotive Service for Andre Foreman:** The attached copies of records recovered from Tidewater Towing corroborate the statements of Landrum (TAB D) and Rudiger (TAB C) concerning automotive work performed by employees of Tidewater Towing on Foreman's car. A Norfolk Police Department search of documents and computer files seized from Tidewater Towing failed to reveal any specific billing records. The computer files do include file entries for "Foreman" that corresponds to the same. Due to computer programming safeguards installed years ago by Tidewater Towing, the computer files could not (after several months of varied attempts) be "read" or "converted" to useable computer languages. According to witness testimony Foreman received this automotive service either free or at reduced rates dating back to 1994 [documents reflect work predating 1994]. Additionally, the DMV record of Foreman's registration of the 1982 Black Mercedes is included. (TAB E)

2) **Governmental Correspondence Regarding Contracting for 1997 City Tow Contract:** Included are several documents detailing the record of the communications back and forth between various departments to include the Norfolk Police Department, the Office of the City Manager, and the Office of the Purchasing Agent. These documents when read in connection with the relevant witness statements reveal that the documents often memorialize decisions already made. Of note is Assistant City Manager Sterling B. Cheatham's memorandum of December 2, 1996 which while approving the recommendations of the Towing

Advisory Board Cheatham specifically rejected "item number 4" dealing with revenue. The 1997 City Tow Contract as drafted and signed includes the distribution percentage of auction proceeds rejected by Cheatham. (TAB R)

3) **Norfolk Police Department Correspondence Regarding Awarding of 1997 City Tow Contract:** As related in the Norfolk Police Department Summary of Investigation (TAB A), those Norfolk Police Department officers involved day-to-day in the towing field recommended against awarding the 1997 City Tow Contract solely to Tidewater Towing and recommended having more than one towing contract to create a "competitive environment". The specific findings were documented in a memorandum from Assistant Chief of Police Darden to Chief of Police dated February 7, 1997. (TAB P) Tidewater Towing was then granted an opportunity to respond to the noted complaints. The entire packet was then forwarded to Sterling B. Cheatham, Assistant City Manager on March 4, 1997. (TAB P) Thereafter, in a letter dated April 24, 1997 [after the 1997 City Tow Contract had already been approved and signed], CPT. Young from Special Enforcement Division forwarded a seven-page memorandum outlining continuing problems with the 1997 City Tow Contract (TAB Q). This memorandum specifically referenced the inconsistencies with the Goff Street Lease rates. CPT Young's memorandum is annotated as forwarded to Andre Foreman on April 30, 1997. [Interestingly, on March 18, 1997 the Chief of Police forwarded a memorandum to the Purchasing Agent recommending that Tidewater Towing receive the 1997 City Tow Contract.]

4) **Comparison of 1992 and 1997 City of Norfolk Tow Contracts:** The Norfolk Police Department prepared a one page reference key to the relevant differences between the 1992 City Tow Contract and the 1997 City Tow Contract awarded to Tidewater Towing. (TAB S) The key areas that benefited Tidewater Towing were a reduction in the lease fee for the Goff Street lot; Tidewater Towing's ability to access 100% of the generated escrow account to recoup the contractor's [Tidewater Towing] costs; a $25 fee for investigation tows the city pays to Tidewater Towing; and the overall increase in fees for the contractor. As reported during July 1999 Tidewater Towing had failed to timely pay even at the lower lease rate for the Goff Street Lot. It should be noted that while there have been subsequent amendments or changes to the 1997 City Tow Contract in the last 18 months, the investigation has not revealed any "correction" to the lease rate [should it have been considered a clerical error]. There has not been a computation of the losses to the City of Norfolk based on the 1997 contract.

5) **1992 City of Norfolk Tow Contract and Accompanying Lease Agreement for Goff Street Lot.** (TAB T)

6) **1997 City of Norfolk Tow Contract and Accompanying Lease Agreement for Goff Street Lot.** (TAB R) Of interest is the January 8, 1997 City of Norfolk Request for Proposals No. 9342, Towing Services in which the ninth page sets out the language of the Code of the City of Norfolk Concerning "Ethics in Public Contracting". (TAB N) The covering memorandum from Assistant City Manager Sterling B. Cheatham dated January 8, 1997 references a "selection committee" to be appointed by the Chief of Police to evaluate the proposals

submitted and recommend an award to the City Manager. This investigation indicated that essentially that "selection committee" recommended against the awarding of the contract to Tidewater Towing. (See TAB N)

7) **Foreman Memorandum of 4/16/97 Forwarding 1997 City Tow Contract to Chief of Police.** Foreman forwarded the April 15, 1997 City Tow Contract between the City of Norfolk and Tidewater Towing Service, Inc. [signed by William J. Summs on April 15, 1997] to Chief of Police requesting approval of contents and return to Foreman. (TAB Q) The contract as forwarded and recommended by Foreman [the city attorney responsible for review as to form and substance of such contracts] included the reduction in cost of the lease of the Goff Street Lot payable by the contractor as well as the numerous additional terms favorable to Tidewater Towing.

8) **City Tow Contract Amendment of 1998:** One year after the awarding of the 1997 City Tow Contract to Tidewater Towing the city of Norfolk passed an amendment to the City Tow Contract. The Amendment as authored is only requires Tidewater Towing to perform functions that were supposedly implicit in the terms of the original contract such as the prompt notification of owners and lienholders. (TAB V) On the other hand, the city of Norfolk agreed to assume responsibility to provide Tidewater Towing with information from the Department of Motor Vehicles (DMV) within 48 hours of a tow as to the owner and lienholder so Tidewater Towing can then provide the required notice. Tidewater Towing one year earlier in

bidding for the contract had stated it could provide this service.

The cap on storage fees included in the amendment was described as a response to the practice that Tidewater Towing had failed to efficiently process towed vehicles. [Note: Financially, there was no incentive under the 1997 City Tow Contract for Tidewater Towing to efficiently process towed vehicles since they could "bill" the city, according to witnesses, for storage fees on towed vehicles and access the city escrow up to 100% to recoup such "losses". The contract thereby created a profit opportunity for Tidewater Towing by merely doing nothing. Finally, the cap on storage fees that was included in the amendment applies only to vehicles with a value of less than $3000. Once again, in the context of what is known concerning the relationship between Foreman and Tidewater Towing, the passage of the Amendment over the objection of much of the Norfolk Police Department is similar to the initial awarding of the unified City Tow Contract to Tidewater Towing a year earlier.

9) **Department of Motor Vehicles Opinion Letter, January 12, 1998:** This document should be read in conjunction with Lt. Howard's note and the SED correspondence from the summer of 1997 as it confirmed Lt. Howard's concerns as well as reaffirmed the legal requirements on Tidewater Towing. (See TABs U and V)

10) **1998 Contract Towing Audit, forwarded July 30, 1998:** This audit is self-explanatory and its findings as to the efficiency and operational state of Tidewater towing, as evaluated, seriously call into

question the receipt by Tidewater Towing of the 1997 City Tow Contract. (TAB W) The problems identified in the audit are in contradiction to the terms of the 1997 City Tow Contract.

APPLICABLE LAW

Section 33.1-88 of the Code of the City of Norfolk states that "No public employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor ... any payment ... services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is exchanged. [Section 33.1-90 places the same prohibition upon the "bidder, offeror".] Sections 33.1-86 through 33.1-93 of the Code of the City of Norfolk, Virginia, 1979, as amended, entitled "Ethics in Public Contracting" are included. (TAB X)

Section 18.2-447 of the Code of Virginia states that "a person shall be guilty of bribery" for either offering a pecuniary benefit or other benefit as consideration for or to obtain or influence the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant or party official OR accepting or agreeing to accept the same. A "public servant" is defined as any officer or employee of this Commonwealth or any political subdivision thereof; a "pecuniary benefit" means a benefit in the form of money, property, commercial interest or anything else the primary significance of which is economic gain. "Benefits" means a gain or advantage, or anything regarded by the beneficiary as a gain or advantage, including a benefit to any other person or entity in whose welfare he is interested". Section 18.2-446 of the Code of Virginia. (TAB X)

Section 18.2-449 of the Code of Virginia states the violation of Section 18.2-447 is a Class 4 Felony, and "if such person be a public servant he shall in addition forfeit his public office and shall be forever incapable of holding any public office.

There are few reported cases in the area of bribery. "Bribery is an offense against public justice, the gist of the crime being the wrong done to the people by corruption in the public service." Ford v. Commonwealth, 17 Va. 889, 15 S.E.2d 50 (1941). See generally Mendez v. Commonwealth, 220 Va. 97, 255 S.E.2d 533, (1979).

ANALYSIS

The information gathered during this investigation paints a troubling picture of the system of governmental contracting for towing services in the city of Norfolk, Virginia. What should have been a contracting process that gained input from numerous counterbalancing sources thereby ensuring fairness in practice did not operate in that fashion. The initially desirable goal of consolidating city towing contracts into one contract and privatizing services became an opportunity for Tidewater Towing and its proponents to seize control of the towing market in Norfolk. Finally, throughout this period Deputy City Attorney Andre Foreman maintained an inappropriate relationship with Tidewater Towing that, at a very minimum, created the appearance of preferential treatment of Tidewater Towing in comparison to its competitors.

I have critically reviewed the evidence contained in this report. It has been proven both through documentary evidence and witness testimony that Deputy City Attorney Foreman maintained a close relationship with Tidewater Towing and its principals, William Summs and Barry Rudiger. This relationship manifested itself through the

receipt by Foreman of automotive work documented through Tidewater Towing records. Whether Foreman paid only cost for this work or received it for free is not essential to confirm although the investigation cannot negate the possibility that Foreman paid for such work. Rather, is it the fact of the existence of such a personal relationship that served to allow Tidewater Towing to perform the work on Foreman's car directly that is of concern.

The relationship manifested itself through repeated meetings over several years, which were occasions that allowed Summs and Rudiger to solicit insight from Foreman on improving Tidewater Towing's position with respect to city towing contracts, according to Rudiger [our only source of information as to the nature of such meetings]. These meetings were reported to have occurred at numerous locations to include the Town Point Club and Tidewater Towing's Lance Road Compound. Documentary evidence confirms the fact of Summs and Rudiger maintaining and utilizing an active membership at the Town Point Club. Numerous employees at one time of Tidewater Towing as well as members of the Norfolk Police Department confirm that Foreman visited Tidewater Towing repeatedly both during and after business hours. Thus, against a landscape in which there is no evidence that Foreman maintained such routine personal or professional contact with other towing concerns, the fact of such a relationship between Foreman and Tidewater Towing is troubling.

Even a cursory review of these materials leads one to consider the question of whether a formal criminal action against Foreman should be pursued. It is my opinion that while this investigation has documented Foreman's actions as a public employee of the city of Norfolk to be reprehensible, there are several requirements of proof lacking that prevent the pursuit of legal action at this time.

In order to prosecute a "public servant" under Section 18.2-447 of the Code of Virginia for a felony offense the Commonwealth would have to prove that the "pecuniary benefit" received directly affected the recipient's [arguably Foreman] exercise of discretion as a public servant. This investigation has revealed no direct evidence that in the absence of a personal relationship with the principals of Tidewater Towing, Foreman would not have made the same decisions or taken the same official acts. In other words, the investigation indicates that Foreman consistently supported the consolidation of towing contracts, the goal of privatization of towing services to in theory save the city money, and the record that Tidewater Towing as a company was best equipped to service the city of Norfolk. Certainly, a reasonable person might speculate that the intermittent gifts and "lobbying" type activities advanced by Tidewater Towing to Foreman placed Tidewater Towing in a more favorable light in Foreman's eyes.

Likewise, under Section 33.1-88 of the Code of the City of Norfolk the question is raised as to what is a payment or service or item of more than "nominal value". This investigation documented that Foreman over several years received gifts of a minimal or undetermined value. With respect to the auto repairs, the documents reveal Foreman appears to have paid for the cost of a part, yet not paid for labor. Foreman, according to Rudiger, received boxes of cigars and golf tickets. The investigation did not produce any single gift or transaction of a large dollar value that would undisputedly be of more than "nominal value". Once again, it is the overlay of Foreman's actions in the name of the city of Norfolk against the backdrop of his undeniably close relationship with Tidewater Towing that is troubling. Whether the City Attorney would want to consider charges pursuant to Sectoin 33.1-88 of the Code of the City of Norfolk is a question I cannot answer.

Perhaps the most significant obstacle to consideration of a criminal prosecution of Foreman is the fact that other members of city government ostensibly ratified every action taken. The meetings at which Foreman advocated on behalf of Tidewater Towing were attended by representatives of the Norfolk Police Department, the Office of the City Attorney, the Office of the City Manager and at times the Office of the Purchasing Agent. The documents contained in this investigation reveal that each city department involved in the 1997 City Tow Contract eventually approved or acquiesced to Tidewater Towing's receipt of the contract.

For example, while this investigation has documented steadfast, reasoned opposition within the Norfolk Police Department to the contract [Assistant Chief of Police Darden's Memorandum of February 7, 1997 recommending against any one towing service receive the contract], the Chief of Police on March 18, 1997 recommended that Tidewater Towing be awarded the contract. Thereafter, on April 24, 1997 the Chief of Police forwarded a Norfolk Police Department Memorandum itemizing problems with the contract language to Foreman. However, the contract itself had apparently already been presented to William J. Summs, President of Tidewater Towing, for signature on April 15, 1997. Several high-ranking members of the Norfolk Police Department stated as part of this investigation that Foreman was commonly regarded as "Tidewater Towing's attorney." The Chief of Police stated as part of this investigation that he known of Foreman's relationship with Tidewater Towing, he would have requested that another city attorney work on the contract. In signing the 1997 City Tow Contract the Chief or Police relied upon the legal advice of Deputy City Attorney Foreman.

The Office of the City Manager, on December 2, 1996, sent to the Purchasing Agent a memorandum instructing that office to prepare a RFP for towing services consistent with the recommendations of the Towing Advisory Board on November 22, 1996 except for the suggested access to escrow by the contractor. Nevertheless, the final contract signed by the City Manager includes the very provision that the December 2, 1996 Memorandum from the Office of the City Manager stated to be inappropriate. As thorough review of this investigation reveals, it is the towing contractor's ability to access the entire escrow fund generated through auction proceeds that makes the 1997 City Tow Contract a lucrative proposition for the towing contractor.

In fact, the difference in the lease terms of the Goff Street Lot detailed by the media during July 1999 [$1,500 a year under the 1997 City Tow Contract versus approximately $1,500 a month under the prior contract] or even Tidewater Towing's failure to even pay this reduced rate in a timely fashion pales in comparison to the ramifications of the towing contractor's ability to completely access the escrow funds, according to those questioned in this investigation. Yet, even in the context of the monthly lease figure the investigation indicates at the very least a lack of attentive scrutiny by the Office of the City Manager. [Note: Current City Manager Regina V. K. Williams was not employed with the City of Norfolk during any of the relevant times when actions relating to this contract were taken. In fact, at the request of the Commonwealth's Attorney, she relinquished responsibility for the complete investigation of this matter to the Norfolk Police Department and the Commonwealth's Attorney.]

Assistant City Manager Cheatham was cited by the Virginian-Pilot on July 21, 1999 as stating that the reduced lease fee was a negotiated figure. Approximately ten days

later, Cheatham indicated as part of this investigation that he did not recall any discussion during the relevant period in 1997 regarding the fact that the lease fee was reduced [even though the Norfolk Police Department reviews of the initial submissions and later the contract itself consistently raised this issue]. Finally, former City Manager James B. Oliver signed the 1997 City Tow Contract containing these provisions.

On March 21, 1997 the City Attorney formally assigned the matter referenced herein as the 1997 City Tow Contract to Andre A. Foreman to handle. This action belies the reality of Foreman's direct involvement over the prior four months in every step of the contract process. In fact the announcement of the Request for Proposals for the 1997 City Tow Contract, dated January 8, 1997, by the Office of the City Manager belies the fact that Foreman had authored the draft contract included as part of the announcement.

In retrospect, all significant actors other than Foreman in the process that resulted in the 1997 City Tow Contract yielded to Foreman's initiative and direction in the field of towing either by omission or commission. Each city department performed those administrative tasks required of them but the real direction or guidance of the process came from Foreman. The appropriate city departments approved every action Foreman took. Therefore, in the framework of such widespread abdication of substantive review and responsibility, Foreman's actions were cloaked in the legality of city action.

CONCLUSIONS

The economic loss suffered by the city of Norfolk as a consequence of the 1997 City Tow Contract and the related actions detailed in this report may never be known. Tidewater Towing's documented failure to process towed

vehicles in a timely fashion to auction directly resulted in increased storage fees for every single car towed, payable to Tidewater Towing. Tidewater Towing's ability to access the entire escrow fund generated through the auction of cars deprived the city of Norfolk of potential revenue. Finally, the economic terms of the 1997 City Tow Contract, whether one looks at the lease rate for the Goff Street Lot or the storage fees or the administrative fees, made the contract an economic windfall for Tidewater Towing.

The relationship maintained by Deputy City Attorney Andre Foreman while employed as a public servant for the city of Norfolk with Tidewater Towing, a prime bidder for contracts from the city of Norfolk, was unacceptable and improper. The evidence contained in this report indicates that Deputy City Attorney Foreman over the course of several years took actions in his official capacity designed to benefit Tidewater Towing. Deputy City Attorney Foreman owed an ethical duty to the citizens of Norfolk. Deputy City Attorney Foreman was entrusted by them to ensure any action he took as the legal advisor to the city of Norfolk for towing matters to be in the interests of those citizens, not in the interest of Tidewater Towing. The information revealed through this investigation strongly suggests Deputy City Attorney Foreman violated that trust and should be dealt with accordingly.

The contracting procedures employed by the city of Norfolk resulting in the 1997 City Tow Contract were inefficient and failed to prevent the problems encountered after the execution of the contract. Communication between city departments with respect to the advisability of contractual terms dealing with towing issues as well as the coordination and integration of input from involved city departments was ineffective and chaotic. While input was solicited from certain sectors of city departments, other city

departments had taken action precluding the consideration of such input.

Upon your consideration of these materials if you should have any questions, I am available at your convenience.

Sincerely,

/s/ Charles D. Griffith, Jr.
Charles D. Griffith, Jr.
Commonwealth's Attorney

The Virginian-Pilot – Tuesday, March 28, 2000

City attorney in hot water over towing contract input

Commonwealth's prosecutor cites conflict of interest

BY MATTHEW DOLAN AND JON GLASS
STAFF WRITERS

NORFOLK -- A city attorney engaged in an "unacceptable and improper" relationship to benefit a private contractor with an exclusive agreement to tow vehicles for the Police Department, according to a report released Monday by Norfolk's top prosecutor.

Deputy City Attorney Andre A. Foreman helped Tidewater Towing, Inc. win a municipal contract, Commonwealth's Attorney Chuck Griffith wrote in a report to the city manager. In 1997, Tidewater Towing became the city's sole towing agent, reaping hundreds of thousands of dollars for removing illegally parked cars and abandoned vehicles from city streets and public property.

Griffith concluded that Foreman did not uphold the trust placed in him as a public servant.

"This investigation strongly suggests Deputy City Attorney Foreman violated that trust and should be dealt with accordingly," Griffith wrote in a blistering 39-page report.

Griffith's report said Foreman -- an integral part of the city's search for towing services -- used "questionable actions" to help Tidewater overcome their competitors, and blamed other city officials for not doing more to stop him.

Foreman had forged a personal relationship with Tidewater's two top officers, Griffith said. Foreman received reduced-cost repair work on his black Mercedes-Benz, free tickets to golf and tennis events and Cuban cigars from Tidewater Towing officials, Griffith wrote.

Before the contract was awarded, Tidewater Towing's two top officials - then-president William Summs and then-vice president Barry E. Rudiger - met Foreman more than 25 times for meals at the Town Point Club to discuss the impending contract award, Griffith wrote.

"The investigation indicates that after such discussion, the structure of city contracts in the towing field was changed to make them more advantageous to Tidewater Towing," Griffith wrote.

Griffith, who investigated the case for months, stopped short of charging Foreman with breaking the law.

"It is my opinion that while this investigation has documented Foreman's actions as a public employee of the city of Norfolk to be reprehensible, there are several requirements of proof lacking," Griffith wrote.

Griffith concluded that he had no proof that Foreman helped Tidewater Towing in return for gifts or favors.

City leaders signed off on Foreman's recommendations, despite protests from other Police Department officials, Griffith added.

"Therefore, in the framework of such widespread abdication of substantive review and responsibility, Foreman's actions were cloaked in the legality of city action," Griffith wrote.

Griffith's office on Monday delivered copies of the report to City Manager Regina V.K. Williams, Mayor Paul D. Fraim and City Attorney Bernard A. Pishko, Williams said.

Williams said late Monday afternoon that she had read only part of the report and wanted to finish it before commenting on its findings. But she voiced unhappiness, calling it "something else that needs to be cleaned up."

The commonwealth attorney's report comes just weeks after City Hall has been hit with other distracting and unflattering news, including an internal audit uncovering sloppy cash-handling practices at some city agencies and a private consultant's report on problems within the Utilities Department.

"We're going to be looking at the role of everybody who had involvement," Williams said of the Tidewater contract. Williams said she plans to review the commonwealth's attorney's report with City Council members today.

Griffith declined Monday to comment on the report. Foreman did not return a call asking for comment.

City Attorney Bernard A. Pishko said Monday evening that he had read Griffith's report and talked with Foreman "very briefly" about it. Pishko said he will "do some of my own evaluation and study" before deciding whether to discipline Foreman. Attorneys in the office work at Pishko's pleasure.

"I think the bigger thing is whether there should be any changes in how we administer towing," Pishko said.

According to Griffith's report, Foreman appeared to engage in a conflict of interest when he acted as both the city's "impartial legal advisor" and informal counsel to Tidewater before, during and after the towing contract was issued, Griffith wrote.

Foreman assured Rudiger before the contract was awarded that Tidewater Towing would be the only qualified bidder, according to Griffith's report.

The final contract with Tidewater contained provisions that benefited Tidewater at the expense of the city, the report concluded.

"The economic loss suffered by the city of Norfolk...may never be known," Griffith wrote.

The report affirms the findings of a Virginian-Pilot investigation last year that the city may have lost out on more than $50,000when officials signed an agreement with Tidewater Towing for exclusive rights to tow vehicles for the Police Department.

In 1997, Tidewater Towing proposed paying $1,500 a month to rent a city-owned lot to store towed vehicles. But when the contract was signed later that year, the $1,500-per-month lease payment had been changed to about $1,500 per year. Also, the Norfolk towing company made no required monthly payments between May 1997, when the contract was signed, and July 1999.

The discrepancy and other issues "were repeatedly raised by the Norfolk Police Department to city officials to no avail prior to the signing of the contract," Griffith wrote in his report.

The city's three-year contract was ultimately signed by Foreman, Police Chief Melvin High and former City Manager James B. Oliver Jr. The contract expires next month. The company apparently grosses more than $200,000 a year from towing fees alone, based on a Police Department estimate of the number of tows Tidewater performed in 1998.

City officials involved in awarding the contract had explained that the lease amount was lowered during negotiations in which Tidewater Towing agreed to provide additional services, saving the city money.

After learning that the company had not paid any rent the previous two years, the city last July sent a letter asking the company for $3,443.75 in past-due rent. The company paid the city that amount later that month.

City officials described Norfolk's failure to monitor the lease to ensure that rent was being paid as an "administrative oversight."

Police first examined the contract discrepancy as part of an investigation into allegations of illegal tows by Tidewater Towing. That inquiry, begun two years ago, led to criminal charges against Rudiger.

Rudiger was convicted in January 1999 of embezzlement for defrauding the American Cancer Society of more than $4,000 in a program to auction donated cars and trucks. He was given a suspended sentence in exchange for his help in prosecutors' investigation into Tidewater Towing.

Griffith and his investigators spent months interviewing 15 witnesses and combing through city documents for evidence of an illegal relationship between

Foreman and Tidewater Towing. But, according to the report, neither Foreman nor Summs were interviewed.

Tidewater Towing officials were not available for comment Monday afternoon. A message left for Ron Pugh, Tidewater's president since November, was not returned.

Foreman, a Norfolk native, joined the city attorney's office in 1985 as an assistant city attorney when he was 37. As deputy city attorney, Foreman is paid an annual salary of $95,875, city records show.

Though Griffith did not pursue criminal charges against Foreman, he recommended that other city officials take action they deem appropriate.

"Whether the City Attorney would want to consider charges" of illegally soliciting or accepting gifts "is a question I cannot answer," Griffith wrote in his report.

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The Virginian-Pilot – Wednesday, March 29, 2000

Norfolk police officials warned chief of towing contract trouble, report says

BY MATTHEW DOLAN
STAFF WRITER

NORFOLK – Three years ago, top Norfolk police officials warned their boss, Chief Melvin High, that awarding a contract to Tidewater Towing Inc. could be a mistake.

Tidewater Towing would raise fees charged for towing vehicles for the city and would pay less rent on a city-owned parking lot to store towed cars than the company had originally proposed, officials told High.

The company also had a history of insensitivity to police and citizen complaints, the officials said.

But High placed his faith with the city's lawyer.

Deputy City Attorney Andre A. Foreman acted as the city's legal counsel on Tidewater's bid for exclusive rights to tow vehicles for the Police Department. High overrode his subordinates' concerns and signed the contract with Tidewater, documents show.

High's decision to support the contract helped set in motion a series of events that climaxed this week with a scathing report from Norfolk's top prosecutor.

Commonwealth's Attorney Chuck Griffith concluded in a report released Monday that Foreman had an "unacceptable and improper" relationship with Tidewater Towing officials while he represented the city during contract negotiations.

"Foreman, over the course of several years, took actions in his official capacity to benefit Tidewater Towing," Griffith wrote.

Foreman also received personal gifts - meals at the Town Point Club, car repairs, tickets to sporting events and Cuban cigars -- from Tidewater's president while apparently providing assistance on Tidewater's contract, according to Griffith's report.

Foreman assured Tidewater Towing officials before the contract was awarded that their company would be the only qualified bidder, according to Griffith's report. The final contract with Tidewater, also signed by Foreman, contained provisions that benefited Tidewater at the expense of the city, the report concluded.

Griffith's 39-page report, however, fell short of recommending criminal charges.

Foreman, who was never interviewed as part of Griffith's investigation, denied that he engaged in acting inappropriately.

"I haven't done anything wrong, and you should get any other comment from the city attorney," Foreman said in a brief telephone interview on Tuesday. City Attorney Bernard A. Pishko, Foreman's boss, said earlier this week that he is continuing to study Griffith's report before taking any action.

High said Tuesday he is still reviewing the report and also would not comment on it.

In 1997, after High and other top city officials signed the contract, Tidewater Towing became the city's sole

towing agent, reaping hundreds of thousands of dollars for removing illegally parked cars and abandoned vehicles from city streets and public property.

Last July, the Virginian-Pilot reported that the city may have lost out on more than $50,000 when city officials signed an agreement with Tidewater Towing.

In 1997, Tidewater Towing proposed paying $1,500 a month to rent a city-owned lot to store towed vehicles. But when the contract was signed later that year, the $1,500-per-month lease payment had been changed to about $1,500 per year.

Several police officials pointed out the discrepancy to High before he signed the contract, documents show.

Police Capt. Michael E. Young also told High of other problems before the contract was signed.

"Based on this contract, it appears Tidewater Towing Inc. will charge more to the citizens of Norfolk per tow than the other two bidding companies," Young wrote to High in an April 1997 memo.

High signed the contract in May 1997.

Other police officials also criticized what they described as the company's history of insensitivity toward police and citizen complaints. After meeting with police Tidewater officials said they would try to improve relations, documents show.

High thought any reservations his subordinates had about Tidewater's contract could be overcome, according to Griffith's report. "Chief High said he trusted the City

Attorney to prepare the proper contractual terms, " Grifiith wrote.

Despite the internal opposition, High recommended that Tidewater be awarded the contract. He wrote a letter to the city's purchasing agent, citing the company's "capacity, equipment and manpower to provide the needed service."

In an interview with Griffith's investigators, Assistant Chief J.H. Jackson told them he had misgivings about Foreman during contract negotiations.

Jackson said no other company contract had the same level "of attorney advocacy" as Tidewater Towing had with Foreman, Griffith's report noted. Jackson said that the joke in the police department was that Foreman was "Tidewater Towing's la....," Griffith wrote.

According to Griffith's report, High would have acted differently if he had known about the relationship between Foreman and Tidewater Towing officials.

The chief "indicated he should have asked for another city attorney," Griffith wrote.

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EDUCATION

July, 1987 - City of Norfolk's Executive Assessment Center

July, 1982 - National College of District Attorneys, Houston, Texas

January, 1980 - Seton Hall University School of Law, Newark, New Jersey - Doctoris in Jure

June, 1975 - California State University, Sacramento, California - Bachelor of Arts, Criminal Justice (with Honors)

June, 1974 - Solano Community College, Fairfield, California - Associate in Arts

EMPLOYMENT HISTORY

July, 1985 to Present	Deputy City Attorney, Department of Law, City of Norfolk, Virginia

September, 1980 - May, 1985	Assistant District Attorney, Philadelphia, Commonwealth of Pennsylvania
September, 1990 to Present	Adjutant Professor, Old Dominion University

ACADEMIC AFFILIATIONS

1978 – 1979	Seton Hall Law Review, Associate Editor
1978 – 1979	President – Black American Law Students Association, Seton Hall University Law School

PROFESSIONAL AFFILIATIONS

1980 – 1985	Member, Philadelphia Bar Association
	Member, Barristers Association of Philadelphia, Pennsylvania
1985 – Present	Member, Norfolk-Portsmouth Bar Association
	Member, South Hampton Roads Bar Association

MILITARY SERVICE

June, 1965 - August, 1977	United States Air Force – Active Duty
August, 1977 - June, 1979	United States Air Force – Reserve Duty

References furnished upon request.

PLAINTIFF'S EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Andre Foreman,
Plaintiff,

v. CIVIL ACTION No. 2:02cv380

Charles Griffith, Jr., et al.,
Defendants.

William Summs,
Plaintiff,

v. CIVIL ACTION No. 2:02cv394

Charles Griffith, Jr., et al.,
Defendants.

ENTERED: August 12, 2002

PLAINTIFFS' MORE DEFINITE STATEMENT

In an Order dated August 1, 2002 (the "Order"), this Honorable Court dismissed all Counts from the Foreman Complaint[1] except for I, II, III, IV, VI, VII, and IX. The Court

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[1] Because this case was originally filed in state court, the complaints were initially styled "Amended Motion for Judgment." References herein to the Foreman Complaint and Summs Complaint refer to their respective Amended Motions for Judgment, in keeping with the nomenclature adopted by the Court in its August 1, 2002 Order.

dismissed all Counts from the Summs Complaint except for I, II, III, IV, V, and VIII. The Court ordered Plaintiffs to file a More Definite Statement as to these remaining counts, as elaborated in the table below.

Plaintiffs Foreman and Summs now move the Court to dismiss Defendant Depew from this action for humanitarian reasons. Plaintiffs Foreman and Summs move the Court to dismiss their respective defamation Counts as to all defendants except for Griffith, in light of the concession by Griffith's counsel at the July 31, 2002 hearing that Griffith was the one who published his Report to the press. Plaintiff Summs moves the Court to dismiss the property-interest component of his Count VIII, and to dismiss Count VIII as to Pishko, leaving intact the liberty-interest component as against Griffith and the City.

The status of the Counts that survived the Order therefore stands as follows:

FOREMAN COMPLAINT		
COUNT(S)	NATURE	STATUS
I, II, III, IV, VI	Defamation	Remain only as to Griffith. More definite statement ordered by Court as to actual words, time and place of publication, and specific facts of which Plaintiffs are to this point aware giving rise to supposition of malice. Facts discovered after the July 31, 2002 hearing must be so identified.
VII	Defamation	Dismissed
IX	Constitutionally Protected Property and Liberty Interests	Remains as to Griffith, City and Pishko. More definite statement ordered by Court.[2]

[2] The Order dated August 1, 2002 instructs plaintiffs to "specify and set forth . . . the custom or practice of the City of Norfolk" on which they rely for their § 1983 claims. Order at 4. Foreman does rely on a custom or practice for his claimed property interest, as elaborated below in Part I.G.2 of this More Definite Statement. Plaintiffs also asserted liberty interests, however, pled in ¶ 60 of the Foreman Complaint and ¶ 52 of the Summs Complaint and elaborated upon in Part III.A of Plaintiff Foreman's Brief Opposing Motion to Dismiss of Defendants Pishko and City of Norfolk and Part III.A of Plaintiff Summs' Brief Opposing Motion to Dismiss of Defendants Pishko and City of Norfolk. Plaintiffs clarify those liberty interests in Parts I.G.1 and II.B below of this More Definite Statement.

SUMMS COMPLAINT		
COUNT(S)	NATURE	STATUS
I, II, III, IV, V	Defamation	Remain only as to Griffith. More definite statement ordered by Court as to actual words, time and place of publication, and specific facts of which Plaintiffs are to this point aware give rise to supposition of malice. Facts discovered after the July 31, 2002 hearing must be so identified.
VIII	Constitutionally Protected Liberty Interest	Remains only as to Griffith and City; dismissed as to Pishko. Property-interest component dismissed. More definite statement ordered by Court.[3]

Plaintiffs' More Definite Statement with respect to the several counts appears below.

I. FOREMAN COMPLAINT

Counts I, II, III, IV, and VI all involve defamation, and are ordered seriatum according to date of publication. Evidence known thus far to Plaintiffs of Griffith's actual malice in making the claimed defamatory statements is detailed in Part I.F, below.

The defamatory nature of all the statements enumerated below is epitomized by the interpretation of the report by a news article in the March 28, 2000 Virginian-

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[3] See n. 2.

Pilot: "Deputy City Attorney Andre A. Foreman helped Tidewater Towing Inc. win a municipal contract, Commonwealth's Attorney Chuck Griffith wrote in a report to the city manager." See "City attorney in hot water over towing contract input," attached as part of Exhibit B to Foreman Complaint. In short, the statements amount to an accusation against Foreman (as well as Summs) that he accepted favors from Summs and Tidewater Towing in return for official acts that favored Tidewater Towing - the layman's definition of bribery, regardless of the technical legal definition. Individually and cumulatively, the statements amount to an accusation against Foreman of "unfitness to perform the duties of an office . . . want of integrity in the discharge of the duties of such an office," and "prejudice [Foreman] in his . . . profession." They are therefore defamatory *per se*. Wells v. Liddy, 186 F.3d 505, 522-23 (4th Cir. 1999) (citations omitted). See also Part III.A, pages 7-10, of Plaintiff Foreman's Brief Opposing Motion to Dismiss of Defendants Griffith and Depew.

A. Count I, Defamation

Plaintiff Foreman claims that the following defamatory statements were made by Defendant Griffith in the Report attached to the Foreman Complaint as Exhibit A, which he published to the Norfolk press, to Norfolk City Manager Regina V.K. Williams, to Norfolk Mayor Paul Fraim, and to Norfolk City Attorney Bernard Pishko, all on or about March 28, 2000.

STATEMENT 1. "From at least 1993 onward the primary officers of Tidewater Towing [Williams Summs and Barry Rudiger] maintained a personal relationship with Deputy City Attorney Foreman that benefited Tidewater Towing and impacted the administration of towing contracts in Norfolk, Virginia." Report at 3 (emphasis added).

Plaintiffs categorically deny that their friendship impacted Norfolk towing contracts. This sentence defames Plaintiff Foreman because in the context of the entire report on an investigation into criminal wrongdoing it is tantamount to asserting that Foreman's work on the City's towing contract had been compromised by his friendship and favoritism towards William Summs and Tidewater Towing. The defamatory sentence damaged Foreman's standing in the legal profession and conveyed the message that he was unfit for legal or public service, the latter two harms rendering the words defamatory *per se*.

The statement derives additional defamatory force by the following excerpts from the report asserting – completely falsely – that Foreman was, *de facto*, in control of the City's towing contract and thus could manipulate the contract to favor William Summs and Tidewater Towing:

"By the spring of 1997 in Norfolk, Virginia several offices of city government had, in essence, abdicated any authority to act with respect to the administration or review of towing matters to the Office of the City Attorney in Norfolk, specifically Deputy City Attorney Andre Foreman. Foreman was cloaked both in the role of the impartial legal advisor to the city of Norfolk with respect to all towing concerns as well as being equivalent of a partisan departmental officer for towing issues." Report at 2.

"[T]he fact that within the city of Norfolk essentially one man had been acknowledged as the primary gatekeeper in towing matters . . ." Report at 4.

In fact, the police department and the procurement department were intimately involved in the drafting and review of the contract. The police department approved the contract, and had authority under its terms to establish procedures pursuant to which it would be carried out.

STATEMENT 2. Discussions between Foreman, Summs, and Rudiger about a new city towing contract "included how contracts could be structured to allow the towing company to make a greater profit." Report at 3.

The sentence is defamatory because it asserts that Foreman discussed with Summs and Rudiger ways to enrich the profits of the latter at the expense of the City of Norfolk and in violation of Foreman's legal loyalty to the City and its citizens and ethical standards of the legal profession. The sentence thus injured Foreman's professional reputation and accused him of unfitness for public office, both assertions being defamatory *per se* under Virginia law.

STATEMENT 3. "[A]fter such discussion the structure of city contracts in the towing field was changed to make them more advantageous to Tidewater Towing." Report at 3.

This statement is false and defamatory of Plaintiff Foreman for the same reasons as Statement 2: namely, it accuses Foreman of violating his legal duty towards the City in drafting contracts in favor of Summs and Tidewater Towing.

Statement 3 was substantially repeated on March 28, 2002 in a news article in the Virginian-Pilot, entitled "City attorney in hot water over towing contract input," attached to the Foreman Complaint as part of Exhibit B: "'The investigation indicates that after such discussion, the structure of city contracts in the towing field was changed to make them more advantageous to Tidewater Towing, Griffith wrote." Because Griffith could reasonably have foreseen that the press would repeat the statement, he is liable for the republication of his statement, as well. Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 689 (4th Cir. 1989)

(quoting Weaver v. Beneficial Finance Co., Inc., 199 Va. 196, 199, 98 S.E.2d 687, 690 (1957)).

STATEMENT 4. "Finally, after the receipt of the 1997 City Tow Contract, this investigation documented that Foreman had repeatedly interceded on Tidewater Towing's behalf with representatives of the Norfolk Police Department with respect to regulations governing the processing, storage and auction of impounded vehicles." Report at 3.

This sentence is defamatory for the same reasons as Statements 1, 2, and 3.

STATEMENT 5. "[D]uring the evaluation portion of the contracting procedure for the 1997 City Tow Contract Foreman provided advice to Tidewater Towing as to the drafting and distribution of correspondence concerning issues raised during the contracting process." Report at 3.

This sentence is defamatory for the same reasons as Statements 1, 2, and 3.

Statement 5 was substantially repeated on March 28, 2002 in a news article in the Virginian-Pilot, entitled "City attorney in hot water over towing contract input," attached to the Foreman Complaint as part of Exhibit B: "Foreman appeared to engage in a conflict of interest when he acted as both the city's 'impartial legal advisor' and informal counsel to Tidewater before, during and after the towing contract was issued, Griffith wrote." (Emphasis added). Because Griffith could reasonably have foreseen that the press would repeat the statement, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

STATEMENT 6. "Foreman over several years received gifts [arguably of de minimis value] from

Tidewater Towing. These gifts included automotive work from 1993 to 1997 performed on Foreman's car by employees of Tidewater Towing at Tidewater Towing's 1195 Lance Road location at either cost or gratis." Report at 4 (brackets not added).

This sentence is defamatory for the same reasons as Statements 1, 2 and 3, all asserting in essence that Foreman violated his duty of loyalty and honesty to the City and its citizens in connection with the contract ultimately awarded to Tidewater Towing. The falsehood, repeated many times in the report, damaged Foreman in his profession and asserted his unsuitability for public office.

Statement 6 was substantially repeated on March 28, 2002 in a news article in the Virginian-Pilot, entitled "City attorney in hot water over towing contract input." attached to the Foreman Complaint as part of Exhibit B: "Foreman received reduced-cost repair work on his black Mercedes-Benz, free tickets to golf and tennis events and Cuban cigars from Tidewater Towing officials, Griffith wrote." Because Griffith could reasonably have foreseen that the press would repeat the statement, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

STATEMENT 7. "Foreman also received varied other gifts including . . . boxes of Cuban cigars from representatives of Tidewater Towing." Report at 4.

This sentence in context is defamatory for the same reasons elaborated regarding Statements 1, 2 and 3.

Statement 7 was substantially repeated on March 28, 2002 in a news article in the Virginian-Pilot, entitled "City attorney in hot water over towing contract input," attached to the Foreman Complaint as part of Exhibit B: "Foreman received reduced-cost repair work on his black Mercedes-

Benz, free tickets to golf and tennis events and Cuban cigars from Tidewater Towing officials, Griffith wrote." Because Griffith could reasonably have foreseen that the press would repeat the statement, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

STATEMENT 8. "The 1997 City Tow Contract, approved as to form and correctness by Deputy City Attorney Foreman, includes numerous provisions less favorable to the city of Norfolk than prior executed towing contracts. . . . These issues and others with respect to the text and effect of the 1997 City Tow Contract were repeatedly raised by the Norfolk Police Department to city officials to no avail prior to the signing of the contract." Report at 4-5.

Factual implications of this statement are that the contract as a whole was less favorable to the city than earlier contracts, and that the city got a less favorable deal because of Foreman's coziness with Summs, which caused Foreman to ignore provisions in the contract unfavorable to the City that were brought to his attention. While some terms of the contract were less favorable to the City than in previous contracts, they were offset by other terms that were considerably more favorable, which make the report's assertion false because of that omission which would have been obvious to anyone who read the contracts. The statement is therefore defamatory for the same reasons elaborated in Statements 1, 2 and 3: namely, that Foreman compromised his loyalty to the City in connection with the drafting and award of the towing contract in exchange for favors from Summs and Tidewater Towing, a statement that damaged his legal reputation and asserted his unfitness for public office.

There were at least five major improvements on the City's previous towing arrangements in the 1997 contract with Tidewater Towing that benefited the City. First, cost

reduction: under the 1997 contract, the City had to pay nothing, because the contract shifted to the contractor many considerable costs and burdens that the City had previously borne at a cost of around $50,000 per year: the cost of mailing, by certified mail, notice to the owners that their cars had been towed; advertising the auto auctions of towed cars that were conducted to recoup money owed to the City and the cost of towing the car; paying the auctioning company; and other costs and administrative burdens.[4] Second, auditing improvements: the 1997 contract required Tidewater to submit quarterly documentation for each and every car the sale of which did not cover Tidewater's towing and storage costs, before it could recover those costs from an escrow fund containing the surplus that Tidewater and the City received on the sale of other cars. Under the previous regime, there was little or no documentation required. Third, joint-venture bidding: because the 1997 contract was to be so large and required so many tow trucks, the request for proposals inviting bids permitted multiple companies to join together and submit joint bids. This provision was written with an eye towards helping Tidewater's competitiors - because Tidewater was known to be by far the largest towing company, Foreman and others designing the request for proposals wanted to give other companies a fair chance at the bidding and to reap the benefits of competition. Fourth, police supervision: the 1997 contract included a provision giving the police the right to supervise and draft regulations as to the entire towing and recoupment process, so as to ensure maximum citizen

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[4] The 1997 contract also achieved cost savings by giving the City a prior claim over the towing company on funds to meet unpaid bills (that is, occasionally the sale of a car did not generate sufficient proceeds to satisfy both the debts owed by the car's owner to the City and the cost of towing and storage. In that event, the City received all of the money and the towing company received none, unless there was surplussage from the sale of other cars). Plaintiffs are uncertain whether this was a change from the practice under earlier contracts, but it was written, codified as it were, into the new 1997 contract.

satisfaction with the towing program. Fifth, before the 1997 contract, the City had three separate towing programs: one for inoperable vehicles, one for vehicles with unpaid tickets, and one for abandoned vehicles. The 1997 contract consolidated all three programs into one, reducing the City's administrative burden.

Statement 8 was substantially repeated on March 28, 2002 in a news article in the Virginian-Pilot, entitled "City attorney in hot water over towing contract input," attached to the Foreman Complaint as part of Exhibit B: "The final contract with Tidewater contained provisions that benefited Tidewater at the expense of the city, the report concluded." Because Griffith could reasonably have foreseen that the press would repeat the statement, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

STATEMENT 9. "[T]hroughout this period Deputy City Attorney Andre Foreman maintained an inappropriate relationship with Tidewater Towing that, at a very minimum, created the appearance of preferential treatment of Tidewater Towing in comparison to its competitors." Report at 31.

This statement is defamatory for the same reasons as Statements 1, 2 and 3. The word "inappropriate" connotes underlying facts demonstrating corruption or malfeasance of some sort, and is therefore actionable:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the

> statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion."

Milkovich v. Loraine Journal, 497 U.S. 1, 18-19 (1990) (citations omitted).

STATEMENT 10. "This relationship manifested itself through the receipt by Foreman of automotive work documented through Tidewater Towing records." Report at 31.

This statement is defamatory for the same reasons as Statement 6.

STATEMENT 11. "The relationship maintained by Deputy City Attorney Foreman while employed as a public servant for the city of Norfolk with Tidewater Towing, a prime bidder for contracts from the city of Norfolk, was unacceptable and improper." Report at 35.

This statement is defamatory for the same reasons as Statements 1, 2 and 3. The words "unacceptable and improper" connote underlying facts demonstrating

corruption or malfeasance of some sort, and are therefore actionable. See Milkovich, 497 U.S., at 18-19.

Statement 11 was substantially repeated on March 28, 2002 in a news article in the Virginian-Pilot, entitled "City attorney in hot water over towing contract input," attached to the Foreman Complaint as part of Exhibit B: "A city attorney engaged in an 'unacceptable and improper' relationship to benefit a private contractor with an exclusive agreement to tow vehicles . . ." Because Griffith could reasonably have foreseen that the press would repeat the statement, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

STATEMENT 12. "Deputy City Attorney Foreman owed an ethical duty to the citizens of Norfolk. Deputy City Attorney Foreman was entrusted by them to ensure any action he took as the legal advisor to the city of Norfolk for towing matters to be in the interests of those citizens, not in the interest of Tidewater Towing. The information revealed through this investigation strongly suggests Deputy City Attorney Foreman violated that trust and should be dealt with accordingly." Report at 35.

This statement is defamatory for the same reasons as Statements 1, 2 and 3. A statement that someone breached an ethical trust suggests underlying facts demonstrating corruption or malfeasance of some sort, and is therefore actionable. See Milkovich, 497 U.S., at 18-19.

Statement 12 was substantially repeated on March 28, 2002 in a news article in the Virginian-Pilot, entitled "City attorney in hot water over towing contract input," attached to the Foreman Complaint as part of Exhibit B: "Griffith concluded that Foreman did not uphold the trust placed in him as a public servant. 'This investigation strongly suggests Deputy City Attorney Foreman violated

that trust and should be dealt with accordingly,' Griffith wrote in a blistering 39-page report." Because Griffith could reasonably have foreseen that the press would repeat the statement, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

STATEMENT 13. "It is my opinion that while this investigation has documented Foreman's actions as a public employee of the city of Norfolk to be reprehensible, there are several requirements of proof lacking that prevent the pursuit of a legal action at this time." Report at 31 (emphasis added).

This statement is defamatory for the same reasons as Statements 1, 2 and 3. A statement that someone's "actions as a public employee . . . were reprehensible" suggests underlying facts demonstrating severe corruption or malfeasance of some sort, and is therefore actionable. Prefixing "in my opinion" is no saving grace. See Milkovich, 497 U.S., at 18-19. Moreover, it is not clear that the prefatory "in my opinion" refers to Foreman's reprehensibility; in context, it could refer only to the latter part of the sentence about whether proof requirements were lacking.

B. Count II, Defamation

Statements 1, 5, 6, 7, 10, and 11, above, were substantially repeated on or about March 29, 2000 in a news article in the Virginian-Pilot, entitled "Norfolk police officials warned chief of towing contract trouble, report says, "attached to the Foreman Complaint as part of Exhibit B:

> Statement 1: "'Foreman, over the course of several years, took actions in his official capacity to benefit Tidewater Towing,' Griffith wrote."

> Statements 5, 6, 7, and 10: "Foreman also received personal gifts - meals at the Town Point Club, car repairs, tickets to sporting events and Cuban cigars - from Tidewater's president while apparently providing assistance on Tidewater's contract, according to Griffith's report."
>
> Statement 11: "Commonwealth's Attorney Chuck Griffith concluded in a report released Monday that Foreman had an 'unacceptable and improper' relationship with Tidewater Towing officials while he represented the city during contract negotiations."

Because Griffith could reasonably have foreseen that the press would repeat the statements, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

C. Count III, Defamation

Statements 1 and 11, above, were substantially repeated on or about March 30, 2000 in a news article in the Virginian-Pilot, entitled "Norfolk won't renew contract for towing, city manager says," attached to the Foreman Complaint as part of Exhibit B: "Chuck Griffith, Norfolk's top prosecutor, concluded in the report that Deputy City Attorney Andre A. Foreman had an 'unacceptable and improper' relationship with Tidewater Towing and helped the firm land a contract that benefited the company at the city's expense."

Because Griffith could reasonably have foreseen that the press would repeat the statements, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

D. Count IV, Defamation

Statements 5, 6, 7, 8, 10, and 11, above, were substantially repeated on or about April 5, 2000 in a news article in the Virginian-Pilot newspaper, entitled "City attorney involved with towing deal is reassigned," attached to the Foreman Complaint as part of Exhibit B:

> Statements 5, 6, 7, 8, and 10: "Griffith's report said evidence indicated that Foreman accepted gifts - meals, car repairs, tickets to sporting events and Cuban cigars - from Summs and helped the company win the contract with terms that benefited Tidewater at the city's expense."
>
> Statement 11: "In his report, Griffith concluded that Foreman had an 'inappropriate relationship' with Summs that, at a very minimum, created the appearance of preferential treatment' of Tidewater over competitors."

Because Griffith could reasonably have foreseen that the press would repeat the statements, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

E. Count VI, Defamation

Statements 6, 7, 8, 10, 11, and 12, above, were substantially repeated on or about April 19, 2000 in an editorial in the Virginian-Pilot newspaper, entitled "Another mess at City Hall," attached to the Foreman Complaint as part of Exhibit B:

> Statements 6, 7, and 10: "Griffith alleges that Tidewater Towing principals wined and dined the

deputy city attorney [Foreman], repaired his automobile and accorded him other favors."

Statements 8 and 11: "According to Commonwealth's Attorney Chuck Griffith, the city's contract with Tidewater Towing Inc. shortchanges the municipal treasury and is tainted by an 'unacceptable and improper relationship' between the company and the deputy city attorney who negotiated it."

Statement 12: Griffith's findings "also raise questions about at least one official's regard for the public trust."

Because Griffith could reasonably have foreseen that the press would repeat the statements, he is liable for the republication of his statement, as well. Blue Ridge Bank, 866 F.2d at 689.

F. Griffith's Actual Malice in Publishing Falsehoods

All of the following facts were known to or believed by Plaintiffs at the July 31, 2002 hearing; those that were corroborated in Calvin Depew's August 1, 2002 deposition are so identified. "Actual malice" is constituted either by knowledge that a statement is false, or by reckless disregard for its truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) ("'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

1. Griffith himself agrees in the report that there is no evidence that Plaintiff Foreman's actions were in the least bit affected by his relations with Tidewater Towing, and thus knew that Foreman had not breached trust with the citizens of Norfolk, Virginia: "This investigation has

revealed no direct evidence that in the absence of a personal relationship with the principals of Tidewater Towing, Foreman would not have made the same decisions or taken the same official acts." Report at 32. And if Griffith knew that Foreman had breached no trust and done nothing wrong, it follows that he knew or recklessly disregarded the same with respect to Summs whom he had accused of inducing or participating in Foreman's malfeasance.

2. Griffith never sent the report to the Virginia State Bar to consider discipline of Plaintiff Foreman, which he was obliged to do if he genuinely believed Foreman had behaved unethically by compromising his obligations to the citizens of Norfolk in favor of Summs and Tidewater Towing. See Virginia Rule of Professional Conduct 8.3. And if Griffith knew or acted in reckless disregard for whether Foreman behaved unethically, then he knew or acted in reckless disregard for whether Summs had done anything wrongful, because Summs was the flip side of Foreman's unethical action according to Griffith.

3. Griffith never even interviewed Foreman or Summs, despite their repeated pleas to be heard, which is procedurally irregular. Targets of criminal investigations are almost always given opportunities to make statements before conclusions are reached. (Plaintiffs believed this to be true at the time of the July 31, 2002 hearing; it was confirmed by Mr. Depew at his deposition on August 1, 2002).

4. Griffith acted in reckless disregard of the fact that both the police officials he interviewed as part of the report, and convicted criminal Barry Rudiger, were hostile to Summs and Foreman. The police disliked Foreman because Foreman's duties included investigating and prosecuting police malfeasance, and because his support for an omnibus towing contract might decrease opportunities for police

sinecures. (Plaintiffs were aware of police hostility to Foreman at the time of the July 31, 2002 hearing; that hostility was confirmed by Calvin Depew in his deposition on August 1, 2002). Rudiger disliked Summs for discovering and disclosing to the police crimes and frauds that Rudiger perpetrated on Mr. Summs' company. These crimes eventually yielded some 83 criminal counts against Rudiger. Despite knowing or acting in reckless disregard of these witness biases, Griffith concealed them in his defamatory report,[5] which also tends to show his hostility to Foreman and Summs.

5. Bernard Pishko, who later disciplined Foreman, told a newspaper that he found no wrongdoing exposed in Griffith's report. See "City attorney involved with towing deal is reassigned; Pay also cut in effort to end appearance of any impropriety," The Virginian-Pilot, April 5, 2000 (attached to Amended Motion for Judgment as part of Exhibit B). Mr. Pishko's conclusion tends to show that Griffith knew that his use of defamatory terms, i.e., "unacceptable and improper," "breach" of "ethical duty" and public trust, to describe Foreman's and Summs' conduct were false.

6. The City Manager of Norfolk also concluded, like Pishko, that Griffith's report showed only differences of opinion, but no improper or unethical or reprehensible conduct by any party, which would include both Summs and Foreman. The City Manager was quoted: "I didn't find that anyone had acted inappropriately. What you had was a difference of opinions, not anyone ignoring something." See

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[5] Although the Report twice mentions that Rudiger pled guilty to three misdemeanor counts, and that suspension of his 36-month sentence depended on his cooperation with the investigation, see Report at 2, 6, it omits the far greater number of offenses with which he was charged and to which he would be exposed if prosecutor's did not find his cooperation satisfactory, giving him an incentive to embellish or even lie. The Report nowhere mentions police hostility to Foreman.

id. Also, on information and belief, upon receiving and reading the Report, the City Manager said, "Andre just got f----d" (expletive deleted). The City Manager's conclusion further tends to show that Griffith knew that his characterizations of Foreman's and Summs' conduct were false.

7. A member of the City Council was astonished that Griffith had not interviewed Foreman: "City Council member W. Randy Wright cautioned Tuesday against rushing to judgment on Foreman until Pishko's review is complete. Wright said he was astonished that Foreman was not interviewed during Griffith's investigation." See "Norfolk won't renew contract for towing, city manager says," The Virginian-Pilot, March 29, 2000 (attached to Amended Motion for Judgment as part of Exhibit B). A newspaper editorial insisted that the glaring omission needed explanation: "Griffith needs to explain why Foreman was not among the more than a dozen people questioned." See "Another mess at City Hall," The Virginian-Pilot (attached to Amended Motion for Judgment as part of Exhibit B). No explanation was ever forthcoming from Griffith. The city council member's and the editorial's views on the unexplained refusal of Griffith to interview Foreman tend to show that Griffith's omission was because he knew or feared that Foreman's evidence would discredit his defamatory statements in the report and prove them false.

8. On information and belief, Police Chief Melvin High, whom Griffith interviewed for the investigation and quoted in the Report (see Report pp. 19-20), was going to write a public letter in Foreman's defense and averring that the following statement from the Report was inaccurate or misleading: "Had Foreman [expressed any direct relationship with Tidewater Towing], Chief High indicated he would have asked for another city attorney." At the City

Manager's behest, Chief High did not write the letter. The misrepresentation of Police Chief High's view, which was so inaccurate as to prompt Chief High's desire to write a public letter disowning that view, suggests that Griffith knew or recklessly disregarded the truth throughout the Report.

9. The 1997 towing contract contained numerous provisions that were more favorable to the City than under the previous contract, in addition to those that were less favorable. See discussion of Statement 8 above in Part I.A of this More Definite Statement. But Griffith's Report neglected to mention any of them. The omission of any mention of these provisions, despite the three years Griffith had to examine the contract during his investigation, suggests that Griffith knew or recklessly disregarded the truth throughout the Report and particularly with regard to Statement 8.

G. Count IX, Plaintiff Foreman's Constitutionally Protected Liberty and Property Interests

1. Liberty Interest[6]

The following is to clarify the liberty interest of which Foreman claims the City, Pishko, and Griffith deprived him without due process.

It is not the defamatory report, *ipso facto,* nor his demotion, *ipso facto,* that Foreman claims as the liberty interest of which he was deprived without due process. Under Owen v. City of Independence, 445 U.S. 622, 633 n.13 (1980), the Fourteenth Amendment entitles a person to notice and hearing before adverse employment action (i.e., his professional demotion and plunge in salary) in conjunction with defamatory statements. In connection

[6] See n.2, above.

with Griffith's release of the defamatory report, Pishko on behalf of the City demoted Foreman. The defamatory report, coupled with the demotion and the ruination of Foreman's standing and associations within his profession, are the three elements which, together, make up his constitutionally protected liberty interest.

Foreman's liberty interest claim fits the conclusion of the United States Supreme Court in Owen, 445 U.S. at 633 n.13 like a glove: "In Board of Regents v. Roth, 408 U.S. 564 (1972), we explained that the dismissal of a government employee accompanied by a 'charge against him that might seriously damage his standing and associations in his community' would qualify as something 'the government is doing to him,' so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case [i.e., in Owen], the city - through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact 'cause' petitioner's discharge, the defamatory and stigmatizing charges certainly 'occur[red] in the course of the termination of employment. [Citation omitted]. Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's action deprived petitioner of liberty without due process of law."

Following his demotion in connection with the defamatory statements in the report, Foreman's candidacy for a juvenile court judgeship was scuttled, as was his candidacy for appointment to the Airport Authority. Foreman's professional reputation as a lawyer plunged,

meaning an unknown and unknowable number of professional and client opportunities never ripened. Potential clients or business partners do not customarily inform a lawyer whose reputation has been smeared that they would have hired the defamed lawyer but for the defamation.

2. Property Interest.

The following is to clarify the property interest of which Foreman claims the City, Pishko, and Griffith deprived him without due process. Foreman's property interest was also elaborated upon in Part III.A of Plaintiff Foreman's Brief Opposing Motion to Dismiss of Defendants Pishko and City of Norfolk.

Foreman was an at-will employee. But the longstanding custom of his office was to terminate or discipline or demote only for just cause. That was the case during Foreman's approximately 17 years of legal service in the City Attorney's office. Foreman recalls no case in which any lawyer-employee was ever terminated, disciplined, or demoted without cause. That understanding was the "common law" of the workplace,[7] and was communicated to Foreman directly and personally by Pishko, the City Attorney, on more than three occasions. It was also communicated to Foreman and others on numerous occasions by Pishko's predecessor, Phil Trapani. Foreman, however, was disciplined and demoted by Defendant Pishko and suffered a slash in salary without cause. Indeed, Pishko himself informed a newspaper that there had been

[7] Cf. Perry v. Sindermann, 408 U.S. 593, 602 (1972) ("Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement, [citation omitted], so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure.").

no wrongdoing. Foreman thus held a constitutionally protected property interest in remaining undisturbed in his legal position absent good cause. That property interest was taken without due process (because he received no hearing whatsoever) when he was defamed, demoted, and suffered a substantial cut in salary by the actions of Defendants Griffith, Pishko, and the City of Norfolk.

3. City's Liability for Pishko's Action

The City of Norfolk is liable for both Foreman's invaded property and liberty interests through Pishko's action in demoting and disciplining Plaintiff Foreman and slashing his salary in conjunction with Griffith's defamation of him. At oral argument, the Court suggested that Plaintiffs were relying on a *respondeat superior* theory of liability for the City. That is not the case. Foreman's theory of liability against the City relies on its wrongdoing as a principal, as set forth below.

Defendant Pishko, then the City Attorney for Norfolk, demoted, disciplined, and slashed Plaintiff Foreman's salary in conjunction with Griffith's malicious defamatory report of Foreman. Pishko held final authority over Foreman's employment with the City Attorney's Office. According to Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986), a municipality is liable under Section 1983 for the actions of a policymaking municipal employee if the latter has the responsibility and authority to implement final municipal policy with respect to a particular course of action. Defendant Pishko held precisely that responsibility and authority regarding the demotion and discipline of Plaintiff Foreman and his loss of salary. A police chief has been held a municipal policymaker for purposes of Section 1983. See Pembaur, 475 U.S., at 740 n.2. This is different from the *respondeat superior* liability disallowed under

Monell v. Dept. of Soc. Svcs. of City of New York, 436 U.S. 658 (1978).

II. SUMMS COMPLAINT

A. Counts I, II, III, IV, and V, Defamation

Plaintiff Summs claims that the same thirteen defamatory statements, and the same republications, made against Foreman also defame Summs, and for substantially similar reasons. All of the statements of corruption on Foreman's part, state that he was corrupted by Summs and Summs' company, Tidewater Towing. Summs joins with Foreman in categorically denying the truth of any of the statements and the underlying facts that they imply. To paraphrase Portia in Shakespeare's The Merchant of Venice, bribery is twice-damned: it damns both the giver and the receiver. It is as wrong and "unacceptable and improper" to give an inappropriate gift as to receive it. One suffers in the esteem of his profession and community as much for attempting or paying a bribe as for receiving one. Inducing an official to violate his public trust is virtually as morally reprehensible as violating it – oil tycoon Harry Sinclair was held in no less contempt than Secretary of Interior Albert Fall.[8] No one wants to do business with a man who practices such "unethical" sharp dealing as the statements necessarily impute to Summs. While Summs' occupation does not impose the same professional ethics rules as Foreman's, the statements individually and cumulatively nevertheless "impute to [Summs] . . . want of integrity in the discharge of the duties of [his] employment" and "prejudice [Summs] in his...profession or trade" and are therefore defamatory *per se*. Wells, 185 F.3d at 522-23. See also Part III.A, pages 7-10, of Plaintiff Foreman's Brief Opposing

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[8] Sinclair bribed Secretary of the Interior Fall in the Teapot Dome scandal during the Harding Administration.

Motion to Dismiss of Defendants Griffith and Depew, cross-referenced in Part III.A, pages 1-2, of Plaintiff Summs' Brief Opposing Motion to Dismiss of Defendants Griffith and Depew.

Summs' evidence of Griffith's actual malice is enumerated above in paragraphs 1 through 6, 8, and 9 of Part I.F of this More Definite Statement.

B. Count VIII, Constitutionally Protected Liberty Interest

1. Liberty Interest[9]

The following is to clarify the liberty interest of which Summs claims that Pishko, the City, and Griffith deprived him without due process.

The City did not renew Tidewater Towing's contract. Although by the time of non-renewal Summs no longer owned Tidewater Towing, he maintained an interest in its profits. But it is not the non-renewal that Summs claims as the liberty interest of which he was deprived. In the course of non-renewal by the City of Summs' towing contract, Defendant Griffith released a criminal investigatory report impugning Summs' honesty and integrity as a businessman. That defamatory report, coupled with the non-renewal, seriously damaged Summs' standing and associations within his business community and city contracting officials generally. The defamation and non-renewal lead to an unknown and unknowable loss of business opportunities for Summs. Would-be clients or business partners do not ordinarily inform a defamed individual that they intended to do business with him but for the defamation. Prospective business opportunities constitute a constitutionally

[9] See n.2, above.

protected liberty interest when their loss is occasioned by adverse government action and defamatory statements, i.e., the non-renewal of a towing contract in conjunction with defamatory statements. See Owen, 445 U.S., at 633 n.13. The analogy to the protected liberty interest described by the United States Supreme Court in Owen is very powerful. See also Petrone v. City of Reading, 541 F.Supp. 735, 740 (E.D. Pa. 1982) (loss of prospective employment opportunities can qualify as a protected liberty interest). Because Summs was deprived of a cognizable liberty interest without notice or hearing, the deprivation can be redressed by Section 1983.

2. City Liability

The City is liable for the non-renewal of Summs' towing contract with the City in conjunction with defamation that ruined his standing in his community and business associations. At oral argument, the Court suggested that Plaintiffs were relying on a *respondeat superior* theory of liability for the City. That is not the case. Summs' theory of liability against the City relies on its wrongdoing as a principal, as set forth below.

City Manager Regina Williams (to whom Griffith's report was addressed) and the Norfolk City Council held the authority over the renewal of Summs' towing contract. See "Norfolk won't renew contract for towing, city manager says," The Virginian-Pilot, exact date unknown, attached to Complaint as part of Exhibit B ("Williams and council members said they will terminate the [contractual] relationship [with Tidewater Towing]."). The City declined to renew Tidewater Towing's contract in conjunction with Defendant Griffith's malicious report that defamed Summs. On information and belief, City Manager Williams and the City Council held final authority over the contract. According to Pembaur, 475 U.S., at 481, a municipality is

liable under Section 1983 for the actions of a policymaking municipal employee if the latter has the responsibility and authority to implement final municipal policy with respect to a particular course of action. The City Manager and City Council held precisely that responsibility and authority regarding the non-renewal of the Tidewater Towing contract. Again, this differs from *respondeat superior* liability disallowed by Monell, 436 U.S. 658.

III. CONCLUSION

For the foregoing reasons, the Court should not dismiss Counts I, II, III, IV, VI, and IX of the Foreman Complaint and Counts I, II, III, IV, V, and VIII of the Summs Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2002, a true and accurate copy of the foregoing was sent via facsimile and mailed first-class, postage prepaid, to:

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(2)

Supreme Court, U.S.
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No. 03-1279

In The
Supreme Court of the United States

ANDRE A. FOREMAN,

Petitioner,

v.

CHARLES D. GRIFFITH, JR., BERNARD A. PISHKO, CALVIN R. DEPEW, and CITY OF NORFOLK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

1. For purposes of 42 U.S.C. § 1983, does petitioner, a former Deputy City Attorney, state a claim for deprivation of liberty without due process against his employer, the City and its City Attorney, who, without a public hearing, reassigned petitioner to the position of Assistant City Attorney and reduced his pay in accord with his lesser responsibilities, merely because petitioner also alleges that his reassignment was a result of his having been earlier maliciously defamed not by the City, City Attorney or any other City employee or officer, but rather by a separate and independent officer, the Commonwealth's Attorney, over whom the City and City Attorney have no control and for whom they have no legal responsibility?

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INTRODUCTION

Both the Question Presented and the Statement of the Case, as presented by the petitioner Andre A. Foreman (hereinafter "Foreman"), are less than complete in setting out the precise basis upon which Foreman seeks to pursue a § 1983 claim against his former employer and his ultimate supervisor, the City of Norfolk, Virginia (hereinafter "City") and its City Attorney, Bernard A. Pishko (hereinafter "Pishko"), respectively. It is to be regretted that Foreman has crafted the Question Presented and the Statement of the Case in this fashion, apparently deliberately to obscure the distinction between the different actors and different governments about whose acts he complains. To that end, it is necessary to set out in greater length than should have been necessary the Statement of the Case, including the factual allegations offered by Foreman in support of his own position.

As will be seen below, once Foreman had completed amending and revising his pleadings, and voluntarily dismissing certain claims, he was left to complain that he was maliciously defamed by a report authored and published by the defendant Charles D. Griffith (hereinafter "Griffith"), the local prosecutor for state charges, then Commonwealth's Attorney for the City of Norfolk, an elected position established and made independent by the Virginia Constitution, and separate and apart from and not subject to the control of the Norfolk city government. Not only did Foreman abandon claims that he was defamed by the City and Pishko, Foreman asserted that Griffith's maliciousness and knowing publication of falsehoods was proved by statements attributed to the City and Pishko which indicated that, notwithstanding Griffith's allegedly defamatory report, the City and Pishko determined that

there was no wrongdoing by Foreman. Rather than having an *Owen*[1]-like claim for injury to a liberty interest as a result of what "the government" did to him (in *Owen*, a police chief was allegedly defamed by City Council resolution and statements, *and* then discharged by the City Manager), Foreman complains that he was demoted by the City and Pishko as a result of the defamation by Griffith, an official of an entirely separate and independent government whose acts the City and Pishko were absolutely helpless to control, dictate or direct. Furthermore, the City under Virginia law is not able to effect any discipline whatsoever upon the Commonwealth's Attorney for any acts of misconduct he or she may have performed. If Foreman has been maliciously defamed by Griffith, his remedy is to seek compensation for the damages which accrued him from that allegedly malicious defamation. Foreman's then employer and ultimate supervisor did not, however, under any recognized precedent of this Court, deprive Foreman of his liberty interest, in violation of due process, even if they reassigned him and reduced his pay as a result of the alleged defamation by another.

STATEMENT OF THE CASE

1. Foreman was, at all times pertinent, either a Deputy or Assistant City Attorney in the Office of the City Attorney for the City of Norfolk, which office was presided over by City Attorney Pishko. (Amended Motion for Judgment, hereinafter "AMJ," ¶¶ 1, 4, at Foreman's Appendix

[1] *Owen v. City of Independence*, 445 U.S. 622, 623 n.13 (1980).

to Petition for Writ of Certiorari, hereinafter "Appendix," p. E-2).

2. The defendant City of Norfolk is an incorporated municipality of the Commonwealth of Virginia. (AMJ, ¶ 6, at Appendix, p. E-3).

3. Griffith was, at all times pertinent, Commonwealth's Attorney for the City of Norfolk (AMJ, ¶ 2, at Appendix, p. E-3). The position of Commonwealth's Attorney is an independent elected position having no connection to the government of the City or County in whose geographic limits the powers of the Commonwealth's Attorney are executed. (Va. Const., Art. VII, § 4, and cases interpreting that provision.) At no time was Foreman an employee of the Commonwealth's Attorney or his office. (Appendix, pp. E-76 to E-77.)

"4. The genesis of this case" was an investigation by the Norfolk Police Department and Griffith of, *inter alia*, the role of Foreman in award and execution of a City towing contract (AMJ, ¶ 8, at Appendix, p. E-3), which resulted in a report authored by Griffith (AMJ, ¶ 9, at Appendix, p. E-3). Foreman asserts that the report was published by Griffith and was "massively defamatory" of him. (Petition for Writ of Certiorari, hereinafter "Petition," p. 4, ¶¶ 2 and 4, relying on AMJ, ¶¶ 10, 11, 14, 15 and 16.)

5. "Respondent Griffith's report falsely and maliciously maintained that [Foreman] was guilty of reprehensible, unethical, and dishonest conduct and favoritism . . . in the award of a city towing contract." (Petition, p. 4, ¶ 3, relying on AMJ, ¶ 14.)

6. Although in Foreman's Amended Motion for Judgment it was asserted that Pishko, among others, published

and republished defamatory statements by publishing the report, and knowing its falsity, relied upon the report to demote Foreman, the pleadings, as later amended, and exhibits initially attached, repudiated those assertions. Thus in his More Definite Statement entered on August 12, 2002, Foreman moved the Court to dismiss defamation counts against all defendants other than Griffith "in light of the concession by Griffith's counsel . . . that Griffith was the one who published his report." (Plaintiffs' More Definite Statement, at Appendix, p. F-2) (filed in civil actions of Foreman and another, consolidated by the district court).

7. Further, in the same More Definite Statement, Foreman asserted that Pishko, rather than agreeing with Griffith's report, "found no wrongdoing exposed in Griffith's report" and told that to a newspaper in explaining Foreman's reassignment. (Plaintiffs' More Definite Statement, at Appendix, p. F-20.)

8. Exhibit B to the Amended Motion for Judgment, expressly referenced in the More Definite Statement, and attached here as a Supplemental Appendix to this Brief in Opposition to Petition for Writ of Certiorari, is a newspaper article on Foreman's reassignment in which it is reported that Pishko said that he determined that no wrongdoing occurred, and that "It's a question of appearance. . . . What I was handed was not something unequivocal. . . . Given that report, [Foreman] working with the police or the commonwealth's attorney's office would present some issues, and the social services work [to which he was reassigned] takes him out of that area." In the same newspaper article, Norfolk City Manager Regina Williams was quoted as saying that "I didn't find that anyone had acted inappropriately. . . . What you had was a

difference of opinions, not anyone ignoring something."[2] (Supplemental Appendix herein, at pp. A-3 to A-4.)

9. Although in his More Definite Statement, Foreman alleged that his "demotion" was "[i]n connection with Griffith's release of the defamatory report" (Appendix, pp. F-22 to F-23), the alleged defamatory report was dated March 27, 2000 (Appendix, p. E-16), and the City Attorney's reassignment was announced on April 5, 2000, according to Exhibit B to the Amended Motion for Judgment. (Supplemental Appendix herein, at p. A-1.) Pishko is reported therein to have said that his decision was based upon having conducted "his own review since receiving Griffith's report, including interviewing Foreman, Summs and city officials involved in the contract discussions."

10. Although Foreman asserts that he was "demoted," the same newspaper article attached as an exhibit to Foreman's Amended Motion for Judgment reports Pishko as having indicated that Foreman had been "reassigned" but would "go to work as a full-time attorney for the city's Department of Human Services, and that his pay had been

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[2] The newspaper article of April 5, 2000 was the only exhibit to Foreman's Amended Motion for Judgment that was not made a part of the Appendix to Foreman's Petition for Writ of Certiorari. It was also the only such exhibit omitted from the Joint Appendix filed in the court of appeals, despite the request by the City and Pishko that it be included. A Supplemental Joint Appendix was necessarily filed in the court of appeals as a result. For purposes of a review of a Rule 12(b)(6) dismissal, the factual background includes the exhibits attached to or referenced in an initial pleading. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990), *Gasner v. County of Dinwiddie,* 162 F.R.D. 280, 282 (E.D.Va. 1995), *aff'd*, 103 F.3d 351 (4th Cir. 1996).

reduced because the new job carried fewer responsibilities." (Supplemental Appendix herein, at p. A-3.)

11. Subsequent to the events described in the pleadings, Foreman voluntarily resigned his employment with the City.

ARGUMENT

I. FOREMAN DOES NOT ASSERT A VALID § 1983 CLAIM FOR VIOLATION OF HIS LIBERTY INTEREST WITHOUT DUE PROCESS BY VIRTUE OF HIS HAVING BEEN REASSIGNED BY HIS EMPLOYER.

At the outset, it must be remembered that the municipal defendants, the City of Norfolk and its City Attorney Pishko on the one hand, and the defendant Griffith, Commonwealth's Attorney for the City of Norfolk, on the other hand, are independent of and unrelated to each other. They are not arms of the same government, but are different entities altogether. The division in Virginia between a municipality and its Commonwealth's Attorney is long established and clear. "Because of the need for a Commonwealth's Attorney to be able to exercise unfettered discretion in performing his duties, the Commonwealth's Attorney, like the sheriff, is independent of municipal or county and state governments. It follows, then, that these entities can exert no control over the actions of persons elected and occupying positions as constitutional officers." *City of Virginia Beach v. Commonwealth*, 19 Va.Cir. 283, 285 (1990), citing *Sherman v. City of Richmond*, 543 F.Supp. 447 (E.D.Va. 1982); *see also Hilton v. Amburgey*, 198 Va. 727, 729, 96 S.E.2d 151 (1957); Va. Const. Art. VII § 4. This distinction is critical, fatal to Foreman's

liberty interest claim, and not only ignored by Foreman, but attempted to be swept under the rug when Foreman attempts to take advantage of cases which talk about what "the government" did to its employee-plaintiff.

Throughout these proceedings, petitioner relies upon footnote 13 in this Court's decision in *Owen v. City of Independence*, 445 U.S. 622, 633 n.13 (1980). Foreman asserts that his liberty interest claim fits footnote 13 in *Owen* "like a glove." (Plaintiffs' More Definite Statement, at Appendix, p. F-23.) It is submitted here, however, that it fits like a big round peg in a small square hole – not at all. The discharged employee in *Owen* was discharged by the City the day after the employee was accused of criminal and other misconduct by a City Council member during a public City Council meeting, at which meeting the Council passed a resolution to publish a police investigative report of the employee and his office, and directed the City Manager to take "all direct and appropriate action" against persons revealed by the report to have been involved in illegal and wrongful misconduct. Here, petitioner asserts that he was defamed not by any City Council, City Manager or even City Attorney, but rather by the Commonwealth's Attorney, as demonstrated above, a separate, independent, state constitutional officer. Here, Foreman asserts that statements made by the City Attorney and the City Manager are so favorable to his position, and at odds with the conclusion of Griffith in his report, that those statements by the City and Pishko support his conclusion that Griffith's report was not only false, but malicious. (Appendix, pp. F-20 to F-21.) Due process requires a hearing on the discharge of a government employee "if the *employer* creates and disseminates a false and defamatory impression about the employee in connection with his termination. . . ." *Codd v. Velger*, 429 U.S. 624, 628 (1977) (*per curium*) (emphasis

added). Foreman's own pleadings, as amplified by his More Definite Statement, recite that the false and defamatory impression about which he complains was created and disseminated exclusively by Griffith, not by Pishko or the City.[3]

In briefs filed below, Foreman characterizes the arguments made by Pishko and the City, as well as the ruling of the district court, as depending upon the assertion that the defendants responsible for the derogatory remarks and actions were "different." Foreman goes on to assert that such a position is inconsistent with *Owen v. City of Independence*, 445 U.S. at 633 n.13, arguing that the footnote upon which he relies stands for the proposition that a § 1983 due process-liberty interest claim can be made even when the entity causing damage to reputation or standing in the plaintiff's community is different from the entity taking the adverse employment action. In *Owen v. City of Independence*, however, there were not different legal entities involved, but rather at best, different agents (the City Manager, the City Council and one of its members) of one entity, the City of Independence.

Indeed, the Court of Appeals for the Fourth Circuit, in *Stone v. University of Maryland Medical System*, 855 F.2d 167 (4th Cir. 1988), summarized the decisions of this Court governing due process-liberty interest violations in connection

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[3] Ironically, dealing in an area of jurisprudence where it is beyond dispute that defendants may not be made liable under *respondeat superior* or vicarious liability theories, Foreman would impose liability on the City and Pishko for the intentional acts (alleged maliciously publication of a "massively defamatory" report) of not even a subordinate employee but rather a separate governmental official, the Commonwealth's Attorney, Griffith.

with employment decisions, and that summary clearly indicates how ill-fitted the precedent upon which Foreman purports to rely is with respect to the case he presents. Thus the court of appeals has said that, in order to state a claim for violation of due process-liberty interest, a plaintiff-employee:

> would have to allege facts tending to show that his superiors made charges against him that "might seriously damage his standing and associations in his community" or otherwise "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," *Board of Regents v. Roth*, 408 U.S. 564, 573-75, 92 S.Ct. 2701, 2707-08, 33 L.Ed.2d 548 (1972); that those charges were made "public" by his employer, *Bishop v. Wood*, 426 U.S. 341, 348-49, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684 (1976); and that the charges were false, *see Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 883, 51 L.Ed.2d (1977).

Stone v. University of Maryland Medical System, 885 F.2d 164, 178 n.5 (4th Cir. 1988). The court of appeals further said that "the clear implication from *Paul v. Davis*, 424 U.S. 693, 710-11 (1976), is that a public employer's stigmatizing remarks do not deprive an employee of a liberty interest unless they are made in the course of a discharge or significant demotion." *Id.*[4]

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[4] As the court of appeals noted in its decision below, the portion of this quotation from *Stone* which speaks to "significant demotion" was *dicta* which was later squarely rejected by the same court of appeals in *Johnson v. Morris*, 903 F.2d 996 (4th Cir. 1990). The quotation here is repeated to highlight that the employer here did not make the allegedly false stigmatizing remarks nor were they made by the employer in the course of an employment decision.

Foreman's claim obviously must fail when judged by this standard. Foreman, formerly a City employee, does not allege serious charges made against him *by his superiors*. Rather, he complains of defamation by the then Commonwealth's Attorney, who is not even a fellow employee of Foreman's, or any employee of the City, let alone Foreman's superior at the time. The only remarks attributable to Pishko, the City Manager or any City employee are remarks considered by Foreman to be so favorable to him that he offers them in his More Definite Statement as proof for the proposition that Griffith's statements were made with malice. Further, the charges of which he complains (again, those made by Griffith) were not made "public" by his employer, the City of Norfolk. Rather, Foreman has abandoned any claims he might previously have made of publication of those charges by others than Griffith. Moreover, the allegedly stigmatizing remarks of the employer must be made in the course of the employment decision. Again, the only remarks attributable to Pishko are those set out in an April 5, 2000, newspaper article, which is part of Exhibit B to the Complaint, in which Pishko reportedly said, in conjunction with reassigning and reducing the pay of Foreman, that he had "determined that no wrongdoing occurred. It's a question of appearance . . . What I was handed was not something unequivocal . . . Given that report, [Foreman] working with the police or the commonwealth's attorney's office would present some issues, and the social services work takes him out of that area." Complaint, Exhibit B, *Virginia Pilot* article "City Attorney Involved with Towing Deal is Reassigned, dated April 5, 2000; Supplemental Appendix, at p. A-3. Likewise the City Manager is not alleged to have made any stigmatizing remarks about petitioner Foreman.

If petitioner is really able to prove what he says he is alleging, that Griffith maliciously defamed him and as a result, caused not only a demotion and loss in pay, but also denied Foreman a judgeship and other appointments, then Foreman may be entitled, under state law, to recover damages from Griffith for that malicious defamation. It does not follow, however, that the City and Pishko violated Foreman's constitutional rights, and specifically deprived him of liberty interest without due process of law, by reassigning him as a result of the allegedly malicious defamation effected by someone else for or with whom the City and Pishko are not legally or otherwise responsible or connected.

II. TO THE EXTENT THAT THERE IS A CONFLICT BETWEEN THE COURTS OF APPEALS AS TO THE EXTENT OF THE ADVERSE EMPLOYMENT ACTION WHICH MUST BE TAKEN BY AN EMPLOYER IN CONNECTION WITH DEFAMATION OR STIGMATIZING STATEMENTS BY THAT EMPLOYER BEFORE A DUE PROCESS-LIBERTY INTEREST CLAIM IS IMPLICATED, THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THAT CONFLICT.

As explained above, the circumstances of the separate alleged defamation of Foreman by Griffith, the Commonwealth's Attorney, and the later action by the City, through Pishko, with respect to the employment of Foreman do not implicate due process-liberty interest rights of Foreman. Moreover, even ignoring what is said above, Foreman's reassignment does not qualify as an injury that entitles him to claim deprivation of his liberty. There is no question that Foreman was not discharged. *See*, *Paul v. Davis*, 424 U.S. 693, 710 (1976) (cited and quoted in footnote 13 in *Owen v. City of Independence*, analyzing *Board of*

Regents v. Roth, 408 U.S. 564 (1972) as recognizing that to implicate liberty interests an employer's "defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time [a governmental] employer might be considered responsible for a statement defaming an employee who continues to be an employee.") *See also Johnson v. Morris*, 903 F.2d 996 (4th Cir. 1990), expressly relied upon by the court of appeals below. In order to articulate a claim that an employment decision is so debilitating as to be deemed to have restrained the employee's liberty, an employee must, in effect, argue that he has been made unemployable. It is undisputed that Foreman here remained employed, and thus he cannot even argue that he was effectively denied his liberty to seek employment elsewhere. *Foreman v. Griffith, et al.*, No. 02-2284, (4th Cir. November 17, 2003) (unpublished), at Appendix, pp. A-15 to A-16.

Even assuming, *arguendo*, that Foreman's liberty rights are potentially involved and that something less than a discharge will potentially violate his liberty rights, Foreman's own pleadings make it clear that the reassignment, even if called a "demotion," is by no stretch of the imagination so serious as to constitute an invasion of Foreman's liberty interest. Foreman did not sustain a sufficiently significant demotion so as to trigger constitutional protection under the liberty interest provisions of the due process clause of the Fourteenth Amendment, assuming that a significant demotion would ever trigger that protection. *See Moore v. Otero*, 557 F.2d 435, 438 (5th Cir. 1977) (finding the demotion of police officer from corporal to patrolman did not implicate constitutionally protected liberty interest under the due process clause, but

leaving open the question of whether a demotion from corporal to janitor would implicate a liberty interest). Specifically, the circumstances surrounding Foreman's reassignment within the Office of the City Attorney do not create an issue of constitutional moment. Foreman was still engaged in the practice of law with the City of Norfolk and its subdivisions as his clients. Quite simply, Foreman's position changed from that of Deputy City Attorney to Assistant City Attorney, but he was still employed by the City, and still employed as an attorney in the Office of the City Attorney. It is not unimportant to the stigma analysis under which Foreman asserts he has suffered irreversible damage so great as to affect adversely his liberty that Pishko, in his capacity as City Attorney, chose to retain Foreman as one of his Assistant City Attorneys. Pishko's decision to continue Foreman's employment belies any assertion that the transfer in position has such a stigmatizing effect on Foreman's ability to pursue his chosen profession that it might be likened to an injury to Foreman's own liberty. Rather than stigmatizing him to that extent, the decision to continue his employment, albeit at a different level of responsibility, carried with it the tacit approval of Foreman's ability to perform tasks as an attorney to which Foreman, as a member of the Office of the City Attorney, was to be assigned. While surely the reassignment was not pleasant, in the face of what Foreman asserts was malicious defamation with resulting damage to his reputation, Foreman was at least allowed to take some comfort in the fact that his employer (Norfolk) and ultimate superior (Pishko) although reassigning him, did not terminate him and instead denied that there had been any wrongdoing, notwithstanding the allegedly defamatory report.

Ironically, Foreman's own Petition, in asserting reasons why a writ should be granted (arguing that there is a dispute among the courts of appeals) cites authority further explaining why it is not necessary for this Court to intervene. Foreman cites *Ersek v. Town of Springfield*, 102 F.3d 79 (3rd Cir. 1996), setting out a portion of footnote 5 from that case. Foreman appears to criticize the Court of Appeals for the Third Circuit for neglecting to resolve what Foreman impliedly asserts is a burning disagreement between courts of appeals begging for resolution. Indeed the court of appeals did not neglect to resolve the difference, but like the district court here, did not need to address it, because plaintiff simply could not establish a liberty interest violation even if a demotion, as opposed to a discharge, would satisfy the requirement of adverse employment action.

In *Ersek*, the plaintiff municipal employee was investigated by the police, although never charged. Following that investigation, the Town, unlike the City and Pishko here, released an admittedly false statement, suggesting that the Town Council had been aware of the investigation for a much longer period than was accurate. Like the City and Pishko here, however, the Town did not release a report of the investigation. The court of appeals affirmed the grant of summary judgment to the Town because there was no allegation, nor could there be, that the Town had published false statements which damaged Ersek's reputation. Ersek was denied, by the Town, a new contract with the Town as favorable as the one he had previously enjoyed, but because the harm to his reputation was attributable to false statements not issued by the Town but rather by the police investigating him and/or the newspaper coverage of such investigation, there was no constitutional liberty

interest-due process claim against the Town available to Ersek.

CONCLUSION

In the instant case, notwithstanding a report published by the Commonwealth's Attorney that asserted wrongdoing on the part of Foreman, Foreman was allowed to continue as an employee of the City, indeed allowed to continue as an attorney in the Office of the City Attorney. The City Attorney and the City Manager publicly disagreed with the report's conclusion, and both publicly said they found no wrongdoing by Foreman. Foreman, once he learned that Griffith published the report of which he complains, abandoned a defamation claim against the City and Pishko. Further, Foreman offered statements by Pishko and the City Manager as evidence not only of the falsity of Griffith's report, but also of Griffith's maliciousness in believing that there was wrongdoing when, according to Pishko and the City Manager, they found none. On those allegations, and under the circumstances as alleged in petitioner's pleadings, it is clear that any damage in reputation to Foreman accrues not from allegedly false statements from his employer, but rather despite statements otherwise favorable to Foreman by his employer. Whether or not Foreman was defamed by Griffith, Foreman has no constitutional claim for deprivation of his right to liberty by his employer and ultimate superior, the City and Pishko, in deciding only to reassign but not

terminate Foreman, and not coincidentally, in coming to at least his partial defense.

Respectfully submitted,

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City attorney involved with towing deal is reassigned

Pay also cut in effort to end appearance of any impropriety

BY JON GLASS
STAFF WRITER

4.5.03

NORFOLK – Andre A. Foreman, a longtime deputy city attorney, will be reassigned and receive a substantial pay cut in the wake of an investigation that raised questions about his relationship with a towing company that won an exclusive city contract.

Foreman, a 15-year employee of the city attorney's office, will be relieved of his duties as a deputy attorney and will have $25,000 slashed from his $95,875 annual salary, Foreman's boss, City Attorney Bernard Pishko, said Tuesday.

Foreman will go to work as a full-time attorney for the city's Department of Human Services, primarily handling child welfare cases, Pishko said. He will no longer do legal work on city contracts for goods or services.

"I've made these decisions with much anguish, and I think they're the right things to do," Pishko said in an interview.

Later Tuesday, an attorney representing Foreman and William J. Summs, Tidewater Towing Inc.'s former president, faxed a five-page letter to Pishko asserting that neither had done anything wrong and asking that no action be taken against Foreman involving loss of pay, seniority or benefits.

The attorney, Gil Davis of Fairfax, called Foreman and Summs victims of "innuendo and false accusations" contained in a scathing report released last week by Norfolk's top prosecutor.

Davis blasted the report as "replete with errors, inconsistencies, misconceptions of facts and downright lies."

Chuck Griffith, Norfolk's commonwealth's attorney who recently was named a Circuit Court judge, was out of town Tuesday and unavailable for comment.

In his report, Griffith concluded that Foreman had an "inappropriate relationship" with Summs that, "at a very minimum, created the appearance of preferential treatment" of Tidewater over competitors.

The firm in April 1997 won exclusive rights to tow abandoned and illegally parked cars for the Police Department.

Griffith's report said evidence indicated that Foreman accepted gifts – meals, car repairs, tickets to sporting events and Cuban cigars – from Summs and helped the company win the contract with terms that benefited Tidewater at the city's expense.

But the 39-page report, based on a police investigation that began in 1997, fell short of recommending criminal charges. Foreman was never interviewed by the investigators.

Pishko said Tuesday that he had conducted his own review since receiving Griffith's report, including interviewing Foreman, Summs, and city officials involved in

the contract discussions. Pishko said he determined that no wrongdoing occurred.

"It's a question of appearance," Pishko said. "What I was handed was not something unequivocal."

Given that, Pishko said he decided not to fire Foreman, but instead to relieve him of his duties as a deputy city attorney. Pishko said he reduced Foreman's pay because the new job in Human Services carried fewer responsibilities.

Pishko said Foreman no longer would work closely with city police officers or the commonwealth's attorney.

As a deputy city attorney, Foreman handled criminal prosecutions, heading the city's vice and prostitution team, and he worked on civil litigation and Alcoholic Beverage Control cases – all of which required a close relationship with police. In recent years, Foreman had been mentioned as a possible candidate for a local judgeship.

"Given the report, Andre working with the police or the commonwealth's attorney office would present some issues, and the social services work takes him out of that area," Pishko said.

City Manager Regina V.K. Williams, who reviewed the actions of other city employees involved in the contract discussions, said Tuesday that no one else would be disciplined.

The issue was complicated because the city was trying to save money by consolidating three towing contracts into one, resulting in internal disagreements over who could best provide the service, Williams said.

Griffith's report, for example, noted that Police Chief Melvin C. High had overruled the objection of top officers and followed Foreman's counsel to hire Tidewater.

"I didn't find that anyone had acted inappropriately," Williams said. "What you had was a difference of opinions, not anyone ignoring something."

The city plans to terminate its contract with Tidewater Towing when it expires April 30 rather than extend it as the terms allow.

Williams said Tuesday that Norfolk is putting together an interim plan to have the city's Public Works Department provide towing for the Police Department while officials reassess how best to proceed.

"I believe there are other ways of providing more [illegible] checks and balances," Williams said.

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